TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1900~~ 1902.

No. ~~215~~ 63.

EDMUND H. CHADWICK, PLAINTIFF IN ERROR,

vs.

JOHN M. KELLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED MARCH 20, 1901.

(18,085.)

(18,085.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 275.

EDMUND H. CHADWICK, PLAINTIFF IN ERROR,

vs.

JOHN M. KELLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 3, 1901.

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a UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

EDMUND H. CHADWICK, Plaintiff in Error,
versus
JOHN M. KELLY, Defendant in Error. } L 3505.

Messrs. George L. Bright and Edwin N. Whittemore, for plaintiff in error.

Messrs. Denegre, Blair & Denegre, for defendant in error.

Writ of error to the supreme court of the State of Louisiana from the Supreme Court of the United States of America, returnable at the city of Washington, D. C., within thirty (30) days from the twenty-first (21st) day of February, A. D. 1901.

Transcript of Record.

1 STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Civil District Court for the Parish of Orleans.

Appeal (suspensive) of Edmund H. Chadwick from judgment rendered against him on the 5th day of March, 1900, and signed on the 9th day of March, 1900.

Petition.

Filed April 10th, 1897.

Civil District Court, Division "C"—Hon. John St. Paul, Judge.

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

To the honorable the civil district court for the parish of Orleans:

The petition of John M. Kelly, who resides in this city, with respect represents that Edmund H. Chadwick who also resides in this city, is justly and truly indebted unto petitioner in the full sum of six hundred and thirty-eight $\frac{80}{100}$ ($\frac{80}{100}$) dollars with interest at the rate of six per cent. per annum from September 24th, 1896 until paid, for this, to wit:

That A. J. Christopher, did on or about the fourteenth day of April 1896, by act before Joseph D. Taylor, official notary of the city of New Orleans enter into a contract with said city through John Fitzpatrick its mayor, thereunto duly authorized by ordinance No. 12136 council series, a copy of which will hereafter be produced and which is now referred to as part of this petition, to pave

2 Hagan avenue from Canal street to Esplanade avenue with lake shells; according to certain specifications and conditions more fully set forth in said contract a certified copy of which is hereto annexed and made part hereof.

That said A. J. Caristopher did, on the 10th day of April, 1896, transfer and assign to petitioner all his rights title and interest to the claims due him under said contract with the city of New Orleans and under the laws and ordinances governing the same, and that the said transfer and assignment was duly filed in the office of the comptroller of the city of New Orleans as No. 1346, on the tenth day of April 1896.

That said contract between said Christopher and said city of New Orleans, was made and said paving was done in accordance with act No. 73 of 1876 and in accordance with section 37 of act No. 20 approved June 23rd, 1882 entitled "An act to incorporate the city of New Orleans," etc., as amended by act No. 119 of 1886 as amended by act 142 of 1894, ordinances Nos. 11184, 11849 12136, and other laws and ordinances on the same subject-matter and in force at the time.

That previous to the making of said contract, the council of the city of New Orleans, did by a two-thirds vote pass a resolution to pave said street aforesaid, and did publish notice of said intention in the official journal, once a week for four weeks.

That at the time of the completion of said contract said Edmund H. Chadwick or his vendor or transferrer was a front proprietor on said Hagan avenue, of property having a frontage on the river side of said Hagan avenue, between Carondelet Walk and Toulouse streets, of 307.2 lineal feet; being the whole square bounded by Hagan avenue, Carondelet Walk, Toulouse and N. Rendon streets, that said Edmund H. Chadwick is personally liable to petitioner for paving, filling, curbing and other work done under said contract in front of said property, the amount of three-fourths of the contract price of the same, said three-fourths amounting to six hundred and thirty-eight $\frac{80}{100}$ dollars, together with interest thereon at six

3 per cent. per annum, as stipulated by said contract from September 24th, 1896, until paid.

Petitioner alleges that for the payment of said sum and interest he also has by law a lien and privilege and right of pledge upon said property and the proceeds thereof.

Petitioner shows that said work was completed and has been accepted by the city.

Petitioner further shows that upon completion of said work he obtained the certificate of the city surveyor and commissioner of public works, and otherwise complied with the formalities of the law; that thereupon payment became due and exigible and for the purpose of securing the rights of pledge and lien and privilege on the property aforesaid, your petitioner caused the same to be registered in the office of the recorder of mortgages for the parish of Orleans.

All of which will more fully appear from said certificates and the

endorsements thereon, which are hereto annexed as Exhibit "B," and made part hereof.

Petitioner alleges amicable demand without avail.

Wherefore petitioner prays that said Edmund H. Chadwick be cited to appear and answer this petition, and that in due course of law there be judgment against him and in favor of petitioner for six hundred and thirty-eight and $\frac{80}{100}$ (638.80) dollars, with six per cent. interest thereon from September 24th, 1896 until paid, with recognition of petitioner's lien and privilege on the property described in the foregoing petition and in the certificates referred to therein, to wit: a square of ground in this city bounded by Hagan avenue, Carondelet Walk, Toulouse and N. Rendon streets, and on the proceeds thereof, and condemning the property to be sold and the proceeds applied to the payment of petitioner's claim.

And petitioner prays for costs and general relief.

New Orleans, March 20th, 1897.

(Signed) DENEGRE, BLAIR AND DENEGRE,
Att'ys for Petitioner.

4 CERTIFICATE MARKED EXHIBIT "B," ANNEXED TO PETITION.

Filed April 10th, 1897.

No. 42. CITY'S ENGINEER'S OFFICE, CITY HALL,
NEW ORLEANS, *Sept. 24th*, 1896.

This shall certify that A. J. Christopher contractor for paving Hagan avenue from Canal street to Esplanade avenue with lake shells as per ordinance No. 12136 of the city council adopted March 31st '96, has constructed certain work under his contract and that there is now due him by Edmund H. Chadwick for his portion of work done on Hagan Avenue (river side) street, between Carondelet Walk street and Toulouse street, as itemized below, the sum of six hundred and thirty-eight and $\frac{80}{100}$ dollars with interest at the rate of 6 % per annum from date until paid.

Lumber 4,335.3 ft. B. M. at $35.00 pr. M.....	$151.74
Shells 839.47 sq. yds. at 1.35 per yd.....	1,133.28
Filling 55.95 cu. yds. at 90c. per yd.....	50.35
Cost of block.....	$1,335.37
City's portion $\frac{1}{4}$.....	333.84
Property-holder's.....	$1,001.53

Mean length of block 287.935 ft.
Cost per lineal foot to property-holder $1.73915

Your proportion of cost 307.2 lin. ft. at $1.73915 per ft	$534.27
Lumber 2,986.5 ft. B. M. at $35.00 per M	104.53
Total	$638.80

Approved.
WM. L. McGARY,
Commissioner of Public Works.

Approved.
A. C. BELL,
City Engineer.

Recorded in Mortgage Office Book 572 folio 374.
N. O. October fifth 1896.
(Signed) GEO. GUINAULT.

Contract between the City of New Orleans and A. J. Christopher, Dated April 14, 1896.

5 Annexed to and made part of petition.

Filed April 29th, 1897.

No. —. Council series No. —.

UNITED STATES OF AMERICA, }
State of Louisiana. }

CITY OF NEW ORLEANS, }
Parish of Orleans. }

Be it known: That on this fourteenth day of the month of April in the year of our Lord one thousand eight hundred and ninety-six and of the Independence of the United States of America the one hundred and twentieth. Before me, Joseph Dewey Taylor, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and official notary of the city of New Orleans, and in the presence of the witnesses hereinafter named and undersigned. Personally came and appeared: the Honorable John Fitzpatrick, mayor of the city of New Orleans, herein acting in his official capacity as mayor, aforesaid, being herein and hereunto specially authorized and empowered by ordinance No. 12136, council series, adopted by the city council of the city of New Orleans on the 31st day of March, A. D. 1896, and previous proceedings of the city council, a duly certified copy of which ordinance is hereunto annexed and made part hereof. Also came and appeared: Mr. A. J. Christopher, of this city. And the said John Fitzpatrick, mayor aforesaid, declared that acting in his official capacity of mayor and for and on behalf of the city of New Orleans, and under and by virtue of the authority in him vested by said ordinance No. 12136 council series and previous proceedings of the city council, and in confirmation of a sale and adjudication made by the Honor-

able Charles R. Kennedy, comptroller of the city of New
6 Orleans, on the 16th day of March, 1896.

He does by these presents grant, bargain, sell and confirm unto said A. J. Christopher, the contract for paving Hagan avenue from Canal street to Esplanade avenue with lake shells.

The whole in strict conformity to the plans and specifications on file in the office of the city engineer, and the written proposal of said A. J. Christopher, of the 16th day of March, 1896 and for the consideration and on the terms and conditions hereinafter set forth.

The said A. J. Christopher and assigns is and are hereby bound and obligated to perform this contract well and faithfully strictly in accordance with said plans and specifications, to observe and comply with all the conditions and stipulations therein contained in every particular and at all times to abide by and *he* be held amenable and subject to the terms, penalties and conditions of said specifications, and of the written proposal of said A. J. Christopher, for said work and of this contract which said specifications are in the words and figures following to wit:

Specifications for the Construction of a Shell Road on Hagan Avenue from Canal Street to Esplanade Street.

The roadway between Canal street and the Bayou St. John will be located on the river side of the Hagan Avenue canal and will be thirty feet wide, and a bonding will be placed on the side next the canal to support a 4 x 12 bonding plank to be placed and staubed as hereinafter described under curbing to properly support the road.

The contractor shall, for and in consideration of the price bid, furnish and place all necessary filling required to make a proper approach over the Bayou St. John on either side of the bridge, as also with the roadway adjacent to the levee on the north side of the bayou.

The subgrades will be formed to the shapes and levels given by the city engineer.

All holes in the subgrade will be cleaned out and thoroughly filled with rammed shells, gravel or bats, so that the entire
7 subgrade when finished will present a smooth, solid and even appearance.

Any earth or other excavated material will be used for filling in the sidewalks to the grade established by the city engineer. Any material left after the sidewalks are properly filled will belong to the property-owners, and will be immediately hauled away by them within three days, and, if not, will belong to the commissioner of public works who will haul same away within three days, or, if not, the excavated material will revert to the contractor, who shall remove same from the street.

The curbing will be placed to such a grade as established by the city engineer. This curbing is to extend around the intersections for the whole width of the sidewalks. The curbing will be of 3 x 12 cypress, excepting where a narrower plank is required to make up the required depth, in which case the narrow plank will be placed

on the bottom. The curbing shall be in lengths of 12, 20, and 24 feet, and none shall be less than 16 feet, and the whole thoroughly secured by spiking to a 4 x 6 post spaced every four feet and extending below the gutter bottom a distance equal to twice the height of the curb above the gutter bottom. Every other post shall have a 2 x 6 anchor extending to a 4 x 6 stake driven 3 feet in the ground. This stake to be not closer than 3 feet 6 inches to the curbing, and the anchor to be spiked to the side of the curb posts 4 inches below the top, so that this anchor and staub will not interfere with the paving of the sidewalks. All cypress used to be of good sound quality. A small amount of peck will be allowed.

The gutter bottoms will be 2 x 12, and the counter curbing will be 3 inches thick and of such depth as is necessary. The counter curbing and wings will be anchored in same manner as the sidewalks curbing.

The gutter bottoms will be secured to 2 x 6 mud sills shouldered on and secured to the counter curb and sidewalk curb stakes and the gutter bottoms thoroughly secured thereto by nailing.

The wings will be three inches thick, and constructed according to the directions of the city engineer.

8 The walls of all culverts will be of brick, and the tops of double planking, all according to plans on file in the office of the city engineer.

At each intersection a plank will be placed across the gutter. These crossings to be 3 inches thick and four feet wide.

The shells to be put on in three equal layers of three inches each, and each layer to be thoroughly rolled with a heavy mule or steam roller, so that when the road is finished the aggregate depth of shells will not be less than nine inches. The surface of the roadway will conform to the lines and levels given by the city engineer.

The work to be maintained for a period of three years by the contractor without any extra expense to the city or property-owners.

The commissioner of public works shall be sole judge as to maintenance, and on notification from him the contractor will, at his own expense, fill any holes, make any repairs to the curbing, or make any and all repairs necessary.

The construction of the road to be done in the most thorough and substantial manner and according to directions and instructions from the city engineer, and to his entire satisfaction, and the work will be accepted on the completion of each two blocks by the city engineer and commissioner of public works.

The contractor will furnish the city engineer's office with a copy of notarial contract, and no lines or levels will be given until such copy is in the city engineer's office.

The contractor will also furnish the necessary stakes and labor for setting same.

The contractor will comply with all police and health regulations and ordinances, and will erect necessary barricades, etc., for the protection of traffic and pedestrians.

Bidders will deposit the sum of $50 to insure the signing of contract within 48 hours after notice from the city notary that the con-

tract is ready for signature, which deposit will be returned to all unsuccessful bidders on the adjudication of the contract and
9 to the successful bidder on the signing of the contract. The successful bidder will furnish bond with good and solvent security in an amount equal to thirty-three and one-third per cent. of the estimated value of the contract to insure faithful performance of the work according to specifications. This bond will remain in full force and effect for and during the period of maintenance of three years, to guarantee the maintenance of the work.

Bids for work will be:

Per square yard for the grading, shelling and rolling of the street complete.

Per 1,000 feet B. M. for lumber furnished and placed as specified.

For 1,000 for brick furnished and laid complete.

Work will begin within ten days after the signing of contract, and will be completed within one hundred and twenty (120) working days thereafter.

Bidders in order to be eligible must have paid their city license.

The right is reserved to reject any or all bids.

Office of city engineer, New Orleans Dec. 10, 1895.

L. W. BROWN,
City Engineer.

The said A. J. Christopher, contractor and assigns, is and are hereby bound and obligated to perform and execute this contract well and faithfully, and strictly in accordance with the said hereinbefore-recited specifications; to observe and comply with all the conditions and stipulations therein contained in every particular, and at all times to abide by and be held amenable and subject to the terms, penalties and conditions of said specifications of this contract and under the supervision and direction and to the entire satisfaction of the commissioner of public works and city engineer of the city of New Orleans, who shall be the sole judges of the quality of such work and material.

10 The work herein contracted for shall be commenced within ten days from the date hereof and shall be completed within one hundred and twenty (120) working days thereafter; rainy days, holidays and Sundays not to be counted; and the contractor shall keep the paving and other work done under this contract, in repair for a term of three years after the completion and acceptance of the work herein contracted for without any cost to the property-owners of the city of New Orleans.

Said contractor shall furnish at his own cost, charge and expense all material, labor or assistance which may be required for the proper execution of the work herein contracted for, and all material used of whatever kind shall be of the best quality of the several kinds.

It is agreed and understood that said contractor shall provide watchmen, red lights, barricades and fences at his own expense, and take such other precautions as may be necessary to protect life and property; and he shall be liable for all damages occasioned in any

way by his act or neglect, or that — his agents, employés or workmen, to the entire release and discharge of the city of New Orleans from any liability.

It is agreed and understood that the provisions and requirements of ordinance No. 10486 council series, are made part of the specifications of this contract and accordingly said contractor and assigns is and are hereby bound and obligated to employ only *bona fide* resident citizens of the city of New Orleans as laborers on the work provided for in this contract.

In the consideration of the faithful compliance with and performance of all the foregoing requirements in relation to the construction and maintenance of a shell pavement on said street, by said A. J. Christopher, contractor or assigns, said A. J. Christopher, or assigns, shall be entitled to charge and receive payment, for all work done by said contractor, and accepted by the city engineer and commissioner of public works of the city of New Orleans, in cash current money, from the city of New Orleans, the following prices, to wit:

11 For each square yard of shelling, including grading and rolling of the street, complete one 1^{35}_{00} (1.35) dollars.

For each cubic yard of filling, in excess of six inches furnished and placed in position, ninety (90) cents.

For each thousand feet, board measure of cypress lumber used in curbing, wings, crossings, cross-walks, staubs, and anchors, thirty-five (35) dollars.

For each 1,000 bricks furnished and laid, complete, thirty-six (36) dollars.

Certificates shall be issued on completion of each two blocks of the work herein contracted for and shall bear interest at the rate of six (6) per centum per annum from their respective dates, until paid.

That portion of the work which is to be paid for by the city of New Orleans shall be paid out of the permanent public improvement fund of 1896.

And now personally came and intervened herein Dr. George K. Pratt, of full age and a resident of this parish.

Who having read what is hereinbefore written declared that he does hereby guarantee to the city of New Orleans the faithful performance of the foregoing contract by the said A. J. Christopher contractor, and binds himself and his heirs and assigns, in favor of the city of New Orleans in the full sum of nine thousand (9,000) dollars, lawful money of the United States, payable on demand to the said mayor of the city of New Orleans or his successors in office.

Now the condition of the foregoing bond or obligation is such that if the said A. J. Christopher, contractor shall well, truly and faithfully do and perform all and singular the requirements of the foregoing contract strictly in accordance with the specifications and to the satisfaction of the city council of the city of New Orleans, then the above-written bond or obligation shall be null and

12 void and of no effect, but otherwise to be and remain in full force and virtue. Said surety thereby waives the benefit of **discussion granted by law to sureties.**

Thus done and passed in my office in the city of New Orleans aforesaid, the day, month and year first aforesaid, in the presence of Charles G. Rebentisch and Alphonse J. Cuneo, witnesses of lawful age, residing in this parish, who have signed their names with the said parties and me, notary, after due reading of the whole.

(Original signed) JOHN FITZPATRICK, *Mayor.*
A. J. CHRISTOPHER.
GEO. K. PRATT, M. D.
C. O. REBENTISCH.
ALPHONSE J. CUNEO.
J. D. TAYLOR, *Not. Pub*

A true copy of the original.
New Orleans, Oct. 6th, 1896.
[SEAL.] (Signed) J. D. TAYLOR, *Not. Pub.*

Answer.

Filed April 27th, 1897.

Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

Now comes into court the defendant E. H. Chadwick and for answer to petition of the plaintiff pleads:

1. The general issue.

2. He specially denies the right of the plaintiff to institute this suit in his name, and alleges that the right of action if any is in the city of New Orleans.

3. He denies that notice of intention to pave Hagan avenue from Canal street to Esplanade St. was published in the official journal once a week for four weeks, and that the pretended ordinance was passed by a two-third vote of the city council.

4. He denies the existence of any ordinance for the paving of Hagan avenue from Canal street to Esplanade street, and
13 shows that Hagan avenue does not extend to Esplanade street.

4 (*bis*). He alleges that the pretended adjudication to A. J. Christopher is null and void because all persons who had not paid a city license were denied the right to bid.

5. He denies the authority of the city to pave a street with lake shells and make the property-owners pay therefor.

6. He denies the existence of any ordinance which imposes any part of the paving on the property-owner.

7. He alleges that the pretended contract with A. J. Christopher is moreover null and void because it was not offered by the comptroller at public auction and given to the lowest bidder in this bids were not called for the whole work on Hagan avenue from Canal street to Esplanade street but were called for itemized and special

items of work to be done and materials to be furnished which do not permit the whole cost of the pavement to be ascertained, and equally distributed on the property-owners without reference to the cost of the work in front of each and every piece of property.

Sec. — act 142 of 1894.

Sec. 21 of act 1882, p. 25 sec. 21.

8. He denies that the plaintiff has executed and completed the work according to the pretended contract, and alleges that the certificate issued to him to that effect is not according to the contract and was wrongfully and fraudulently issued.

9. He denies that his property was benefited by the pretended paving, and if it was, and the court should find against him, he charges that he can only be made to pay the amount of benefit to an increased value of the property and no personal judgment should be rendered against him; that the court fix the amount of increased value of the property, and order the sale of the property for the increased value, but render no personal judgment against this defendant.

He prays for general relief.

(Signed) GEO. L. BRIGHT,
Counsel for Respondent.

14 Continued.

Extract from Minutes, Division "C."

FRIDAY, *June 4th*, 1897.

Present: F. A. Monroe judge.

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

For want of time, this case fixed for trial on this day was ordered continued with preference.

Order to Produce.

Filed January 3rd, 1898, and entered on minutes of same day.

Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

On motion of G. L. Bright att'y for the defendant it is ordered that W. R. Brashear Esq., clerk of the city council produce on the trial of this cause, and on any and all days to which it may be continued for trial.

The city ordinance, if any exists, approving or adopting, any plan or specifications for the shelling of Hagan avenue from Canal street to Esplanade street mentioned in the contract made with A. J. Christopher on April 14th, 1896.

Continued.

Extract from Minutes, Division "C."

WEDNESDAY, *January 5th*, 1898.

Present: Honorable F. A. Monroe judge.

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

For want of time this case was continued with preference.

15 Continued.

Extract from Minutes, Division "C."

TUESDAY, *January 18th*, 1898.

Honorable F. A. Monroe, judge present.

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

For want of time this case fixed for trial on this day was ordered continued with preference.

Civil District Court, Parish of Orleans, Div. "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

Testimony for Plaintiff in the Above Entitled and Numbered Cause, Taken in Open Court this 2nd Day of February, A. D. 1898, Before the Hon. Frank A. Monroe, Judge.

Present: Hugh Bayne, Esq., of Denegre, Blair, Denegre and Bayne, for plaintiff; Geo. L. Bright, Esq., for defendant.

By Mr. BAYNE: Plaintiff offers, introduces and asks to be filed in evidence certified copy of a contract between the City of New Orleans and A. J. Christopher, dated April 14th, 1896, for the paving of Hagan avenue from Canal street to Esplanade avenue with lake shells, being the same contract annexed to the petition of the plaintiff.

By Mr. BRIGHT: Defendant objects to all that part of the contract which tends to prove by the statement of the notary public the city ordinance, the plans and specifications upon the ground that the certificate of the notary as to what these are is not evidence,
16 and the only evidence is the ordinance, plans and specifications.

By Mr. BAYNE: Plaintiff offers this in evidence only for the purpose of making *prima facie* proof of those things which the law states is *prima facie* proof.

By the COURT: The objection will go to the effect.

By Mr. BRIGHT: To which ruling of the court, counsel for defendant excepts, and reserves this note in lieu of a formal bill of exceptions.

By Mr. BAYNE: Plaintiff offers, introduces and asks to be filed in evidence certificate of the city engineer and of the commissioner of public works, dated September, 24th, 1896, being document marked "Exhibit B," and filed with the original petition.

J. M. KELLY, Esq. the plaintiff who being first duly sworn on his own behalf, did depose and testify as follows:

Direct examination by Mr. BAYNE:

Q. Mr. Kelly, you are the plaintiff in this suit?

A. Yes sir.

Q. Will you please look at the document handed you dated April 15, 1896, purporting to be the assignment to J. M. Kelly by A. J. Christopher for the contract of paving Hagan avenue from Canal street to Esplanade avenue, in accordance with the contract before J. D. Taylor, dated April, 14, 1896, and state if you recognize the signature attached to that?

A. Yes sir.

Q. Whose signature is it?

A. A. J. Christopher.

By Mr. BAYNE: Plaintiff offers, introduces and asks to be filed in evidence the document identified by the witness, which document forms part of the record of the case of J. M. Kelly *vs.* Mrs. Mouchon *et als.* No. 52850 of the docket of the civil district court, div. "B."

Cross-examination by Mr. BRIGHT:

Q. This contract was adjudicated by the city of New Orleans to Mr. Christopher?

A. Yes sir.

17 Q. And he transferred it to you?

A. Yes sir.

Q. Transferred it to you immediately after the adjudication or before the work was commenced?

A. He transferred it.

Q. This transfer says that you paid him for it the sum of twelve hundred dollars?

A. Yes sir.

Q. Is that a fact?

A. That is a fact.

Plaintiff rests.

No. 53078.

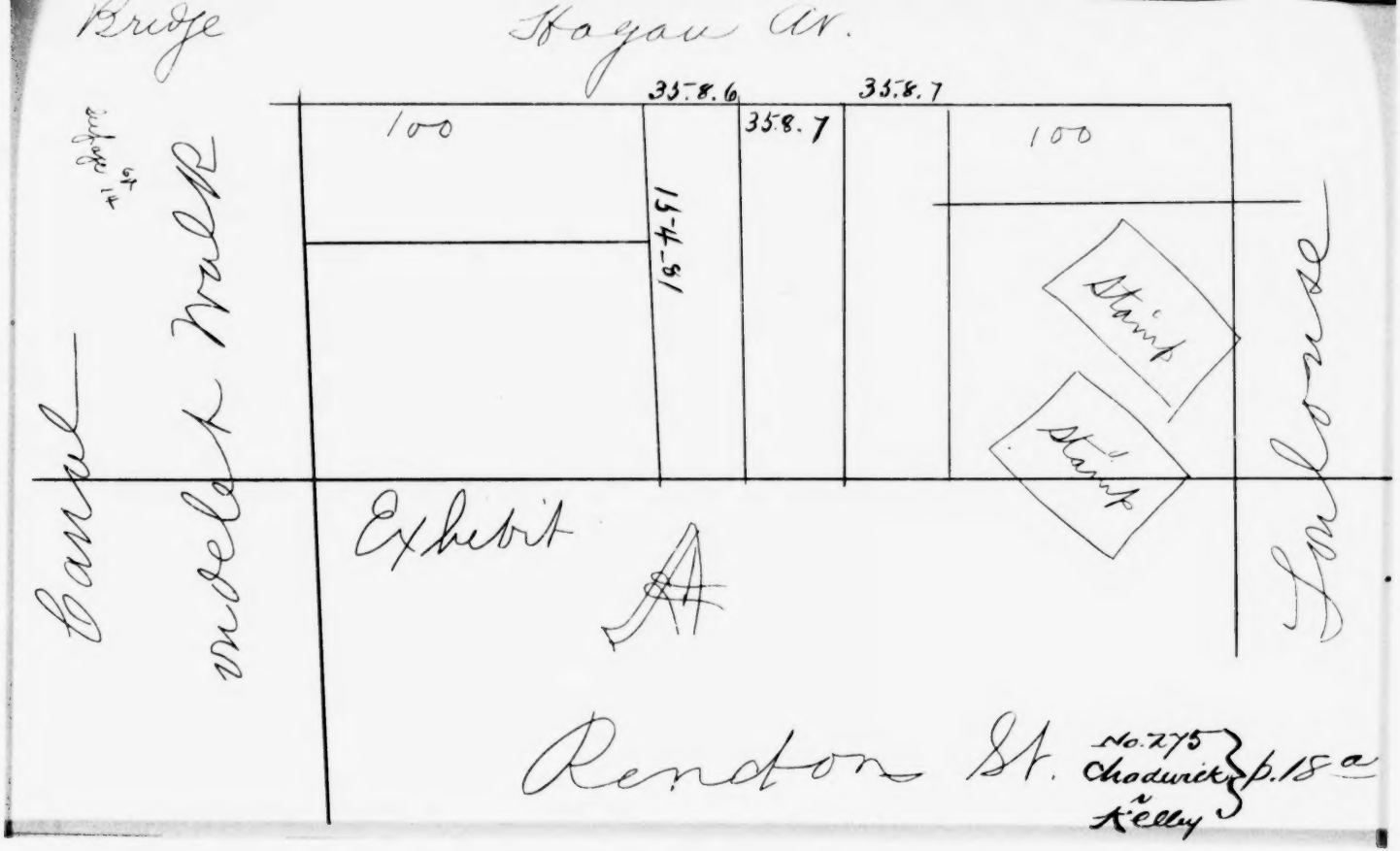
Civil District Court.

JOHN H. KELLY

vs.

EDMUND H. CHADWICK.

Offered in evidence by defendant.
Produced, stamped and filed February 16th, 1898.
JOE GARIDEL, *Dy Clerk.*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No. 275
Chadwick
vs
Kelly
p. 18 a

Civil District Court, Parish of Orleans, Div. "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53708.

Testimony for Defendant in the Above Entitled and Numbered Cause, Taken in Open Court This 2nd Day of February, A. D. 1898, Before the Hon. Frank A. Monroe, Judge.

Present: Hugh Bayne, Esq., of Denegre, Blair, Denegre & Bayne for plaintiff; Geo. L. Bright, Esq., for defendant.

EDMUND H. CHADWICK, Esq., the defendant, who being first duly sworn, did depose and testify as follows:

Direct examination by Mr. BRIGHT:

Q. Mr. Chadwick, you are the owner of the property in this suit?
A. Yes sir.
Q. It fronts on Hagan avenue from Carondelet walk to Toulouse?
A. Yes sir.
Q. You own the whole front?
A. Yes sir.
Q. How many lots?
A. Five.
Q. How are they situated on Hagan avenue?
A. One lot is at the corner of Toulouse and Hagan avenue,
18 and one lot on the corner side of Hagan avenue.
Q. Depth on Hagan avenue?
A. Yes sir, and three lots facing on Hagan avenue and running on back.
Q. Two corner lots?
A. Yes sir, I mentioned that.
Q. Does this little sketch represent it so the court will understand it?

By the COURT: I understand it one on each corner and one lot fronting on Hagan avenue.

A. Yes sir.

By Mr. BRIGHT: Defendant offers, introduces and asks to be filed in evidence this little sketch which is marked "A."

(Here follows diagram marked 18*a*.)

Q. Hagan avenue has been shelled in front of your property?
A. Yes sir.
Q. Have your lots been in any way benefited by this shelling?

By Mr. BAYNE: I object on the ground that the legislative judgment ordering the paving, making this a local assessment, is conclusive on the question as to whether or not the property supposed to be benefited was benefited. I urge this objection earnestly be-

cause there is a defense made in this case which is of the utmost importance namely that the legislative judgment on the question and whether or not the local assessment should be made is not conclusive on the question of benefit.

By Mr. BRIGHT: Let that go in now.

By Mr. BAYNE: I object to the admission of this evidence on the further ground that its tendency is to show that the apportionment of this tax, which the legislature has said should be the apportionment thereof, is an improper apportionment; that the legislative enactment on the question of apportion is conclusive and cannot be reviewed by a court of justice; that the remedy of the public is in having proper legislators appointed who will not succumb to persuasion, but those appointed should use their discretion properly on the question of apportionment, which I can show your honor is a legislative enactment and is final.

19 By the COURT: I am inclined to think that it will be advisable that the evidence should go in. The question is one not altogether free from doubt. I think it is desirable in a case of this kind that the facts should be presented to this court and to the court to which the case will be finally taken. The court will consider the objection to the introduction of this evidence as going to the effect, reserving the right to determine eventually as to what weight will be given to that evidence.

By Mr. BAYNE: To which ruling of the court, counsel for plaintiff excepts and reserves this note in lieu of a formal bill of exceptions.

By Mr. BRIGHT:

Q. Answer the question—have your lots been in any way benefited by this shelling?

A. No, they have been entirely injured. I gave $8.30 some years ago for them. I find the curbing two feet and a half up on average, on the part that faces Hagan avenue. Taking that as a basis to fill them up, to make them any way valuable, it would cost $1,615. That is, to fill them up to the city grade. Those lots are two feet below the sea level.

Q. How much can you sell the lots now for, with the paving?

A. I cannot sell them. I have offered them for $500, all of them, and for $20 apiece.

By Mr. BRIGHT:

Q. Has Hagan avenue been shelled to Esplanade avenue?

A. It has not. It has been shelled to De Soto street.

Q. And for De Soto street to Esplanade street, no shelling whatever?

A. No sir. It is good through from De Soto to Grand Route St. John and there's a small street Florida street, and that has not been opened yet.

Q. It has never been shelled?

A. I haven't seen that place for a year or more.

Q. The plaintiff is not working on it and don't intend to shell any part of it?

A. I haven't seen that for a year.

Cross-examination by Mr. BAYNE:

Q. How is it that that portion which is not paved has
20 never been paved?

A. There's a little street called Hagan avenue between Grand Route St. John and Florida street, about two hundred and twenty feet, and it has never been shelled and the street between has never been opened.

Q. That portion is occupied with houses?

A. Yes sir.

Q. It would be impossible to lay the pavement over it without opening the street would it not?

A. Of course it would be impossible.

Q. Mr. Chadwick, from whom did you get your dimensions as to what it would cost to fill those lots?

A. I measured it on the ground myself. I know it cost a lot to put filling in. It would require three carts—it would come to 45c. a cubic yard, and taking the cubic contents of the five lots with the banquettes it would cost sixteen hundred and odd dollars to fill it up.

Q. Have you ever got any person, engaged in the business, to make an estimate?

A. I am paying now for filling lots, and I know what it costs.

Q. And you state it would require $1,615 to fill your lots up to the city's grade.

A. Yes; that established by the curb that is there now.

Q. And you consider that it is due to the fact that you would have to fill your lots up to that grade, that you have suffered damage?

A. Yes sir. That is, I have received no benefit, and the lots only now show how low they are.

Q. It is due to that fact alone that you have received no benefit, is it not?

A. Yes sir; they have piled mud five and a half feet in front of portions of my property.

Q. Therefore, your failure to receive any benefit is that the grade is raised to the point where it is now?

A. It is the grade of the city. It is due to the fact that I would have to fill it up so much to make it valuable.

Q. To that fact alone?

21 A. Yes sir.

Q. To whom did you offer all of your lots for $500?

A. To Mr. Gallagher.

Q. What Gallagher?

A. Mr. Gallagher of the firm of Gallagher & Spitzfadden.

Q. Did you offer to sell them to him for $500?

A. Yes sir.

Q. In writing?

A. Oh no. He is a dealer in real estate; it is not necessary to put it in writing. He is here to swear to that fact.

Q. To whom did you offer to sell them for $20 apiece?

A. To him, I offered the whole square for $500.
Q. Those lots in that square are unimproved lots?
A. Yes sir; no houses on those lots for many squares around.
Q. No houses on those lots?
A. No sir.
Q. And the division that you have made of that square into lots is one that you merely chose to make?
A. No sir, according to my title and plans, dating back and beginning away beyond the memory of man, it was made.
Q. You state there are no houses on those lots?
A. No sir.
Q. What are they used for?
A. Nothing.

By Mr. BRIGHT:

Q. Any fencing in?
A. Yes sir, I had them fenced in—but the contractor tore them down and used the material.

By Mr. BAYNE:

Q. Were you there and saw them tear it down?
A. It was the contractor that built the bridge that tore most of my fences down.
Q. You don't know if Mr. Kelly tore your fence down or the workmen?
A. I don't think Mr. Kelly or his workmen did. It was the contractor that built the bridge.
Q. As a fact you don't know who tore it down?
A. I do. The contractor of the bridge. They had their
22 gyves fastened to my posts.
Q. At the time this paving was advertised in the newspaper were you in the city?
A. Yes; and protested against it.
Q. Did you set forth before the city council committee and the council the reason for which you did not desire the paving done?
A. Yes sir.
Q. Did you set before them the same reasons as you are urging in this case as the reasons why you should not be made to pay for it?
A. I did because the land was not worth it.
Q. They ordered the paving nevertheless?
A. Yes sir; but you have cut me off from stating the real fact.
Q. Yes, that is not the issue here.
A. The party was a member of the council.
Q. Well, I understood you to say that at the time this paving was contemplated that you laid before the city council committees and the council the reasons why you did not desire this paving done, and those reasons are the same reasons as you are urging now, why you should not pay for the paving?
A. I sent two or three petitions to the boards. I don't remember the reasons. The principal reason was the one urged now.

Q. So far as you remember the reasons urged were the reasons urged in this suit for not paying for the paving?
A. So far as I remember.

By the COURT:

Q. What was Hagan avenue before these shells were put there?
A. It was a morass.
Q. They made a shell road then?
A. Yes sir.
Q. The shell road extends from Canal street pass the front of your property?
A. Yes sir.
Q. The effect then has been to make the property more accessible then it was?
A. It was accessible by the old shell road.
Q. It makes it accessible by this route and it was not so before?
23 A. (No answer.)
Q. Was it accessible from Canal street by way of Hagan avenue?
A. No, sir.
Q. Let us suppose for instance, that somebody else owned a square adjoining yours and that the adjoining square was filled up to grade; would it enhance the value of such adjoining square being up to the grade to make it more acces-ible from Canal street?
A. I don't think it would. There's not buildings enough out there. There's too much vacant land out there.
Q. Your idea is that it does not affect the land deteriorated in order to make it easier to get to it. Is that what I understand you?
A. No, sir
Q. Is it likely to be worth anything to be able to get to it?
A. No, sir.
Q. Isn't the first step to take in order to give value to land necessary to make it accessible?
A. Under ordinary circumstances, yes.
Q. That land of yours, if used for any purpose at all, would not it be necessary that people could get to it and come from it?
A. In its present state, if the court please, it is not worth anything, because it is always almost covered with water. It wouldn't be worth anything for cultivation, and if you filled it up at the present, the cost of filling it would cost far more than it is worth.
By Mr. BAYNE: When was the present city grade established?
A. I don't know exactly. It was under that fifty thousand dollars' typographical survey.
Q. How many years ago?
A. Within the last two or three years.
Q. How many years before this paving was done?
A. It was done before the paving was done.
Q. Mr. Chadwick, isn't it a fact that a great many elements
24 enter into the question of the value of real estate?
A. I don't understand you.

Q. I mean to say isn't it a fact that the value of real estate is determined by a great many surrounding circumstances?

A. To some extent it is.

Q. Wouldn't the fact that if yellow fever had not existed in New Orleans last year, that real estate would have been more valuable than if no fever had occurred.

A. I don't know. It is almost valueless throughout the city.

Q. Did the fever last year affect real estate here?

A. No sir.

Q. You swear to that.

A. That has been my experience of fifty years. The people who buy real estate here are not so afraid of the fever. New-comers are not supposed to buy real estate. The rushing of these public improvements is what effects real estate. A man is afraid to touch land for fear he has to pave the front of it.

Q. Then you can't say that the existence of the yellow-fever epidemic in New Orleans would affect real estate five or six months thereafter?

A. No sir; it is my experience that after fever epidemics the winter is the gayest winter of all.

Q. It does not enter into the value of real estate when some particular persons have some schemes on hand which leads them to look to a particular portion of town in preference to another?

A. Of course a man who wants to buy real estate goes where it suits him best?

Q. In other words isn't there one hundred things which enter into the value of real estate with or without the question of paving in front of it?

A. Yes sir, but they don't want to buy water privilege.

Q. Does the value of real estate vary?

A. Oh yes sir.

Q. When did you offer these lots for sale first?

A. It was just after the contract. I think they had begun
25 the work on it.

Q. The work had not been done?

A. No sir, I think they started *not* right at Canal street and they progressed some distance.

Q. You have not offered them for sale since, have you?

A. I found no one that wanted them in that location.

Q. You have not offered them for sale since?

A. No; not that I know of.

Q. Therefore, you are not in a position to state whether or not you might find some person who would give a good price for those lots?

A. I desire to correct myself: I did offer these lots for sale for $20 to a party within the last eight months.

Q. It was within the last eight months that you offered them for sale?

A. Yes sir.

Q. What month was it?

A. I think it was last March.

Q. Have you sold any of the lots in that square?

A. I sold two of them that I had partially fixed up.

Q. For how much?

A. $125 apiece, through my influence I got a pottery there, and they found it cheaper to buy than to pay rent.

Q. Then, it was due to the fact that you had a pottery there that these lots were worth $125 each?

A. Yes sir.

Q. That is one of the circumstances that might enter the value of lands?

A. Yes sir; they had Carondelet walk to get to the property.

Q. Are those lots as accessible as the Hagan Avenue lots?

A. No sir; because the Carondelet Walk shell road has been very much cut up by hauling heavy machinery over it.

Q. When you offered these lots for sale at times for twenty dollars each, did you stipulate that the purchaser was to pay the paving?

26 A. No, there was no stipulation about it.

Q. What did you intend; that he was to pay for the paving or you?

A. I sell the lots at twenty dollars apiece.

Q. What was your idea with regard to the paving?

A. I believe if I sold him a clear title, I would have had to pay for the paving. To get rid of the land I would take twenty dollars each for the lots. It was last March and the shell road was there.

Q. Have you ever advertised those lots for sale at auction or placed them in the hands of any auctioneer, for the purpose of selling them?

A. Yes sir.

Q. In whose hands?

A. They were in Gallagher & Spitzfadden's hands for a long time. They were there to be seen and for sale.

Q. I understand from your answers to the questions propounded by the judge that you did not think that that property was rendered more accessible by reason of the shell road, and that it had added anything to its value?

A. I answered I did, but that it depends on the condition of the property when you get to it, if it was worth anything.

Q. You don't know what the value of those lots would be if they were filled?

A. I presume I might get a hundred dollars each.

Q. You got $125 for lots not as accessible as these?

A. They are more accessible than these.

Q. You stated a moment ago that they were not?

A. They cut that road up, but when the pottery was put there it was in good condition.

Q. Was it due to the fact that you had repaired the road that you were able to sell that property at a higher price?

A. I presume it was from the fact that there was a road to it. They could get there, and that affected the price.

Q. Then, as to those particular lots, the fact that they were more accessible made their value higher?

27 A. It cost me more money to fill them up. My business is real estate, and in our business when we have a lot of old trash and stuff, instead of throwing it away, I put it in a cart and used it for filling up. It shows some effect afterwards. Now, if I calculate that, it would cost me more than the value of the lots.

Q. Was that the manner in which the lots that you sold for $125 were filled up?

A. Partially filled up. The parties filled them up afterwards.

Q. How did you calculate it cost you more than $125 to fill it?

A. I calculate the distance and the time it took, the cost of the driver of the cart to go there and back again.

Q. You are making that calculation in your mind now?

A. No sir, I made it at the time I sold them and calculated I lost money.

Q. You did not pay anything for the filling?

A. No sir, it was filling I saved the city from hauling away.

Q. Mr. Chadwick, how many lots are there in this square?

A. There are now twenty-four.

Q. Were these two that sold for $125 a portion of that square?

A. Yes sir.

Q. Did I understand you to say that it would cost you $1,516 to fill the entire square up to the grade of the pavement?

A. No sir, $4,500 for the whole square. I mean the lots. It would cost $1,615 to fill up these five lots and the banquettes around them.

By the COURT:

Q. What are the dimensions of those lots Mr. Chadwick?

A. The two in depth on Hagan avenue are one hundred feet by thirty-one feet on Carondelet walk and Toulouse street.

Q. One hundred by thirty-one?

A. Yes sir.

Q. And the other three lots?

A. The other three lots are about 107 on Hagan avenue, fronting.

Q. Those are three?

A. Yes sir.

Q. By what?

A. 154 feet and some inches and some lines.

28 By Mr. BRIGHT:

Q. What is the depth of the filling?

A. Two and a half feet on Hagan avenue and a rise of six inches to the property line, which would make about two feet nine inches on a level with the banquette average on the property line, and it has to be raised according to the city ordinance two inches above the banquette.

By the COURT:

Q. Over and above two and a half feet?

A. Yes sir. It would be three feet at the property line, then you have to go two inches and one inch higher in there, ten feet in depth of the lot, to give it the grade.

Q. What is the average?

A. Three feet and twenty-five-hundredths.

Q. Three and a half?

A. Yes sir.

Q. Don't you think that is a little high, Mr. Chadwick?

A. No sir.

Q. You say that filling would cost 45c. a cubic yard?

A. It is 45c. a cubic yard.

By Mr. BRIGHT: The plaintiff in his contract, is entitled to charge ninety cents a cubic yard for the filling.

By the COURT: That does not prove that you can have a square filled for less money. I am trying to find out how much it would cost to fill those lots. I think $1,516 is a little high. Go ahead with the examination.

By Mr. BAYNE: The contractor had to furnish six inches free under the terms of the contract.

By the COURT: Go on. I have no interest in what the contractor had to do. I am trying to ascertain how much it would cost to fill these lots.

By Mr. BAYNE:

Q. I understand then, that in making that calculation of 1,615 you calculated to furnish a depth at three and a quarter feet.

A. Over the entire surface.

Q. Three and a half feet over the entire surface?

A. No sir, I did not, because that would not bring it so high. That was a temporary calculation. I made a more careful calculation beginning with two and a half feet at the curb-line, increasing it to three feet of the property line, going two inches at the
29 property line and going one-tenth feet in depth of the lot, and getting that grade, as the city exacts from you when you fill up lots, on an average of three and one-quarter feet, it would not amount to so much. That was only a hasty calculation.

Q. Mr. Chadwick, you are not an engineer are you?

A. Well, that depends on what you mean by an "engineer." I engineer a good deal of work.

Q. Are you a civil engineer and surveyor?

A. Yes sir.

Q. You are a surveyor?

A. Not a professional surveyor, but I survey.

Q. Where did you learn to survey?

A. From my brains.

Q. Did you make this calculation by surveying the ground?

A. I went and measured the lot up to the top of the curb. That gave me a point to go on. That is all surveying is. You find one fixed point and you go on that.

Q. You did not use any instruments to make this survey?

A. I used a rule.

Q. With that rule you were enabled to measure from the curb.

A. Yes sir.

Q. And you can state here what the depth of your lot was one hundred feet back of the curb?

A. About the same.

Q. You judge that from your eye?

A. Yes sir, my eye is not very often mistaken.

Q. Is that lot level throughout?

A. No, up towards these lots that I speak of that I sold, it was a little higher than in the next square.

Q. You mean that land is a little higher from the debris and trash you had dumped there?

A. Yes sir.

Q. You stated the ground was higher towards the place where you sold the lots?

A. I made it higher.

Q. Have you made any portion of the lots you now own higher?

A. I don't know whether we hauled anything in there or not. We had a bridge at that corner and from the nature of the workmen they didn't take any more trouble than they could help.

Q. You don't know what the value of this property will be six months hence?

A. I cannot tell you any value in six months.

Q. Those things so vary that you are unable to say what the value of any piece of property would be six months hence?

A. It is a whim of the purchaser.

Q. It is therefore impossible to say whether or not there is a purchaser who will be desiring a particular piece of property?

A. There is so much vacant property that you can't sell it for anything at all.

Q. You can't approximate what the value of this property will be six months hence?

A. No sir, if I spent $1,615 to fill it up I doubt whether it would sell within the next five years.

Q. If you filled it up you cannot approximate what the value would be?

A. No sir, I could not. I doubt if I could get a hundred dollars.

Q. You got $125 for the others?

A. Yes sir, I had a pottery there.

Q. Is not that circumstance of a pottery there an advantage to the other ground?

A. Yes sir, but those chances are rare.

Q. I understand you to say that if you filled this property that you are unable to state what its value would be six months hence?

A. Yes sir.

By the COURT:

Q. According to my calculation, you can fill these lots three and one-quarter feet, and it would be, as I understand it, about three-

quarter feet above the grade, and it would cost you 45c. a cubic yard,—my calculation would make it $1,425.

A. I made a calculation about that, $1,463 taking that basis.

Q. 22,658 cubic yards at 45c. gives $132.75, and you had a quarter more in order to give it three and one-quarters, making it $1,425.

A. I went over the calculation with Mr. Brown and I was in hopes that he would be here, but the lowest calculation I made was $1,462, when I measured the curb and took the average of the depth.

Q. I am taking the whole depth—I am taking what you
31 gave me and I say if you raised the whole lot up from the front to the rear back three-quarters of a foot and paid 45c. a cubic yard, it would only cost you $1,425.

A. It may on that level. Taking the banquettes it would cost——

Q. I am taking what you gave me to go on, three and one-quarter feet.

A. I take that average and make it $1,462.

Q. I am taking the banquettes and the lots at 45c. a cubic yard, I make it $1,425.

A. I made it $1,614.

By Mr. Bayne:

Q. I understood you correctly a while ago to say that the average depth below the grade set by the city was two and three-quarters feet.

A. No sir.

Q. You deny making that statement?

A. No, I do not. The grade set by the city on several banquettes is two and three-quarters feet. Two and three-quarters feet is the average of the banquettes, would have to be two feet nine inches.

Q. Above what?

A. The ground as it now exists.

Q. As is now exists on the banquettes.

A. Yes sir.

Q. How much higher are the banquettes, as it now exists than your lots?

A. There are no banquettes there at all.

Q. Then what have you been using the word "banquette" to mean?

A. To mean that it would have to be a cost to have made there.

Q. How much lower is the banquette, or place where the banquette would be eventually, than the grade fixed by the city?

A. At the curb, two feet, six inches, and the ordinance says half an inch higher in every ten feet, and then the ordinance says the filling should be two inches above the banquette, to begin at, and raised an inch in ten feet, to give a grade for the water to run off to the street.

Q. Is the place where the banquette would be eventually the same level as your lots.

A. Yes sir.

Q. When did you first know what the grade was that the city had fixed for its banquettes?

A. I saw a curb there, and that curb is set on the city grade.

Q. When did you first know of the existence of a law making it necessary for the owners of property to have their banquettes at a certain grade?

32

A. It has always been the law. As long as I have been there, there has been some grade.

Q. It has been the law, you say, always?

A. I understood it to be such.

Q. When did you purchase this property?

A. A copy of the title shows.

Q. About what year?

A. I can't say; it was during the sale of the Gaines estate.

Q. Was it a tax sale?

A. No sir, a receiver's sale.

Q. 21st of April, 1887?

A. Yes sir.

Q. You knew at the time you purchased these lots that the city had a grade for banquettes?

A. It was so far out and it was supposed that they never would get there.

Q. But you knew the grade was fixed for the city?

A. I supposed there was a grade existing. The city was more considerate then. If the property was going to be occupied by poorer people, they would not exact it, but now they exact every inch of it.

Q. Was that property swamp land when you bought it?

A. Yes sir, it has always been.

Q. For what purpose did you buy it?

A. I thought I might levy it around and make a garden, and, as I said before, I wanted space to throw refuse out of my house.

Q. And you thought that refuse would fill up this land?

A. Gradually.

Q. And you expected to be able gradually to fill up this land.

A. Yes sir.

Q. You knew it would have to be filled up to give it any value.

A. I knew it was two feet below sea level when I bought it.

Q. You knew that it would not be good commercial property until you filled it?

A. I knew then, as I know now that it would not pay to fill it except to get rid of the stuff from throwing it into the streets to be a nuisance in the street. That is—the trash.

By Mr. BRIGHT:

Q. Some land has been sold at auction fronting on Hagan avenue since the shelling was put there?

33

A. Yes sir, one square.

Q. How much a lot did that sell for?

By Mr. BAYNE: I object. The best evidence being the act of sale. His memory may not be correct on this subject.

By the COURT: The objection is good. You will have to get a certificate from the conveyance office.

L. W. BROWN, Esq. a witness, sworn on the part of the defendant, did depose and testify as follows:

Direct examination by Mr. BRIGHT:

Q. Mr. Brown, do you know this property of Mr. Chadwick's on Hagan avenue?

A. I understand he owns property there. I have no intimate connection with it. I know the location which he described to me, but I never saw it.

Q. How much below the city grade is it?

A. That I can't answer positively, as I don't know the land. I had never made a survey of it.

Q. Give us your opinion.

By Mr. BAYNE: I object to any opinion evidence. I want it as an absolute ascertainable scientific fact.

By the COURT: It is competent for him to testify whether it is below the level or not, established by the city grade.

A. As I understand it, this property is situated on the lower side of the Navigation canal, bounded by Grand Route, Bayou St. John and Hagan avenue. That property is low property. It is anywhere from one — a half feet to two and a half below the sea level. While I don't know positively the exact elevation of the grade established, I would suppose it would be six or eight inches, or perhaps a foot above sea level.

Q. How high above sea level is the curb?

A. I don't know. I suppose in the neighborhood of eight or nine inches, or a foot. As I said I never took the elevations, but from the profiles in the city engineer's office, it can be easily ascertained.

34 Cross-examination by Mr. BAYNE:

Q. Mr. Brown, it is impossible to ascertain what the level of various portions of a large surface are without making a survey is it not?

A. It depends on the accuracy you would require on the work. If you wanted an approximate estimate, very often you can make it without instruments.

Q. I understood you to say that this grade, as you remember it varies from one and a half to two and a half feet below the grade of the curb?

A. I refer to that particular portion of the city, one and a half to two and a half feet below sea level. This particular lot I don't know.

Q. You don't remember whether this part is one and a half or two feet below city level?

A. No sir, I don't remember. I only speak of that particular locality out there, that neighborhood.

PETER GALLAGHER, Esq., a witness for the defendant, who being first duly sworn, did depose and testify, as follows:

Direct examination by Mr. BRIGHT:

Q. Mr. Gallagher, what is your occupation?
A. Real-estate agent.
Q. How long have you been in that business?
A. I have been dealing in property fifteen years, and I have had an office for about four years.
Q. Have you been acting as agent for property on Hagan avenue?
A. Yes sir.
Q. Do you know the Chadwick property?
A. On Carondelet walk and Toulouse?
Q. Yes sir.
A. Yes sir.
Q. You know that the shell road has been built there?
A. Yes sir.
Q. Will you tell us whether or not that the shell road has been of any benefit to Mr. Chadwick in increasing the value of this property?
A. It has not increased the value of Mr. Chadwick's property, but the property has been benefited, in a way for the general public.
Q. What has been the effect on his property, the building of this shell road?
35 A. I can't say. It has made his property low in the filling of it.
Q. Is the property fit for occupation the way it is now?
A. If it is to be filled yes.
Q. Before that shell road was there, it was more fit for occupation than it is today?
A. It was low then.
Q. It was more fit for occupation then?
A. Well, it could not be occupied until filled.

By the COURT:

Q. Is it any lower now than before the shell road was made?
A. In some parts.
Q. Do you mean to say that Mr. Chadwick's lots have sunk?
A. No sir. I mean by putting the street up some and lowering the ground.
Q. How does it lower a lot to build a shell road or a fence in front of it, supposing the street was lower and the street was put down higher, it would have to be built up? If the square was lower then it would make it two and a half feet by the shells going on it?
A. It would make the street higher and the lot lower. There has been filling put on the street.
Q. The difference between the height of the street and height — lot to sea level, is greater since the street has been raised? I understand that, but how it makes the lots any lower than before the street was filled, I can't see.

By Mr. BRIGHT:

Q. It requires two and a half feet to fill it up now, to make it any use whatever. Before that, it was not necessary, because the drainage machine would take the water off. Now you can't occupy the square at all.

By Mr. BRIGHT:

Q. What is the value of this land now?

A. I wouldn't give any more for it now than I would for it before the paving was put on. He offered me that square for $500 and I would not take it for $500, even with the paving on it.

Q. Why?

A. I don't think I could make any money by keeping it and getting a buyer. It is hard to sell.

Q. Would it require filling before you could sell it?

—. Certainly.

Q. Is it worth the filling?

A. I can't say. I wouldn't fill it as a speculation.

Q. You would not fill it for the lots?

A. No sir.

36 Q. You buy and sell real estate in that neighborhood?

A. Yes.

Cross-examination by Mr. BAYNE:

Q. How long before the paving was done, was it that these lots were offered to you by Mr. Chadwick?

A. How long before the paving was done? Well, about half a year. It was before the paving.

Q. It was before the paving was done?

A. Yes sir.

Q. Very long before the paving was done?

A. Possibly five or six months before; may be more or less.

Q. What did Mr. Chadwick offer you?

A. I believe twenty-two lots for $500.

Q. Were any special conditions to be attached to that sale?

A. None at all.

Q. Just an ordinary sale?

A. Yes sir.

Q. It was to be consummated as soon as you would accept?

A. Yes sir; accept the titles.

Q. Any agreement as to who would pay for the paving?

A. No paving there. He was to give me a clear title.

Q. No question of paving was ever entered into, in any agreement between each other?

A. No sir, nothing about paving.

Q. Why wouldn't you buy those lots for that price then?

A. I went out and looked at it and saw nothing but water. Not only after a rain. He left his plan at my office and I hung it up there offering this property for sale, and I never had a bid, nor have I had anybody to examine the plan.

Q. You say that the property was swamp at the time he made this offer?

A. Yes sir.

Q. Would the property have been of any greater value if it had been filled?

A. It would enhance it some.

Q. I suppose you knew at the time he made this offer, you would have to raise it to the city grade?

A. Yes sir.

Q. All people who purchase lot property know that they have to fill it up to the city grade?

A. Yes sir, fill it up.

Q. You have been engaged, I understood you to say, in the real-estate business for fourteen years?

37 A. Well, around there.

Q. About fourteen years?

A. Yes sir.

Q. Don't a great many things affect the value of real estate?

A. Yes, sir.

Q. Isn't it just about as sensitive in the market as almost any other commodity there is offered for sale in the market?

A. Yes sir.

Q. Wouldn't the reports of projected improvements in a particular locality have the effect of increasing the value of property?

A. Some it does and some not.

Q. It would not affect property the fact of a railroad to be built along in a certain locality,—would not increase the value?

A. Oh, yes.

Q. That is one of the elements that would enter into the value of real estate?

A. Yes sir.

Q. Would not the effect of a yellow-fever epidemic hurt it some?

A. Yes sir.

Q. Wouldn't the recurrence of a yellow-fever epidemic affect the value of real estate?

A. Yes sir.

Q. That undoubtedly would enter into its value?

A. Yes sir, in some locations. The reason I didn't buy was that it would cost $2,500 or $3,000 to fill the property that he wanted to sell me.

Q. That was before any paving?

A. Yes sir. Can I explain? If the question is not put to me, that I sold five lots to Mr. Chas. Louque within a block or two before the paving of either St. Ann or Hagan avenue.

By Mr. BAYNE: I object. The answer will not be responsive to any question asked the witness.

By the COURT: The objection is good. The witness has not been asked the question.

Q. It is necessary to fill all property up to the city grade before it can be made saleable at all?

A. No, I have sold some very low ground.
Q. Before it could be used?
A. Yes sir.
Q. Therefore, before a person buys property, they take into contemplation the fact that in order to use the property, it would
38 have to be filled?
A. Yes sir, that is right.
Q. Do you know anything about the sale of Hagan Avenue property by Mr. Louque?
A. Well, no, I don't.
Q. You don't know of any sales made by Mr. Louque of Hagan Avenue property?
A. No sir, I know he sold one lot. I don't know the location. I know I sold Mr. Louque $1,500 of property in front of Bayou St. John, before that paving, and five more lots fronting on both streets since, for a thousand dollars, which I think he would sell today for the cost of the paving.
Q. Did Mr. Louque ever state to you what he would sell that property for?
A. No sir.
Q. That is merely an opinion of yours as to what Mr. Louque would sell it for?
A. Yes sir. It is an opinion of mine.

By Mr. BRIGHT:

Q. Mr. Gallagher, if when the lots were offered to you for sale, you knew that they were going to shell Hagan avenue, after you bought them, would you have bought them?
A. No sir. I wouldn't give him at this minute, $500 for what he offered to me before the paving was done.

By Mr. BAYNE:

Q. Have you been out there since the paving has been laid?
A. Yes sir. I paid for paving some up there.
Q. Did you look at these particular lots of Mr. Chadwick?
A. Well, I drove by there several times.
Q. Has he offered to sell them to you since the paving was laid?
A. No sir.
Q. You have never been considering any proposition to buy, since the paving?
A. No sir.

By the COURT:

Q. Supposing these lots had been filled up to the city grade before this paving was done, what effect would the improvement have on property on Hagan avenue?
A. It would have some effect, but there is no sale for property out there, at all.

By Mr. BAYNE:

Q. Is the sale of real estate at this period of this year as good as at the same period for preceding years?

A. It is a little quiet now. It is according to the condition of the market.

39 JACOB SPITZFADDEN, Esq., a witness on the part of the defendant, who being first duly sworn, did depose and testify, as follows:

Direct examination by Mr. BRIGHT:

Q. Do you own property on Hagan avenue?
A. Yes sir.
Q. Do you know the property of Mr. Chadwick?
A. I have seen it passing there casually.
Q. Has the shelling of Hagan avenue improved the value of his property?
A. Not to my knowledge.
Q. Give your reasons?
A. Because you can get no more for the property now, after the road is down, then you could before the road was down. I own a piece, I paid $1,400 in 1894 for it and I offered it for sale for $1,500 and can't get a purchaser at all.

Cross-examination by Mr. BAYNE:

Q. Mr. Spitzfadden, you are the owner of property fronting on Hagan avenue?
A. I am.
Q. Suit has been instituted against you to recover the paving bill by Mr. Kelly, the plaintiff in this case?
A. Yes sir, for $361.21.
Q. And you are resisting the paying of that, are you not?
A. I am sir.
Q. You are Mr. Gallagher's partner, the witness who has just left the stand, are you not?
A. Yes sir.
Q. Is it possible to form an opinion of what would be the value of these lots if they were filled?
A. Yes sir.
Q. Are the lots of which you are the front proprietor, on Hagan avenue filled?
A. Well, I don't think they are filled to grade.

CHARLES D. STURTEVANT, Esq., a witness for the defendant, who being first duly sworn, did depose and testify as follows:

Direct examination by Mr. BRIGHT:

Q. Mr. Sturtevant, you know the lots of Mr. Chadwick?
A. No sir.
Q. Do you know the location at the corner of Hagan avenue and Carondelet walk?
A. I heard of it.
Q. You heard of it?

A. Yes sir, I heard of it here today.

40 Q. Do you know of any sales of lots fronting on Hagan avenue, in that neighborhood?

A. The company of which I am secretary, in 1890, put up a square and it was bid off at auction on the first of September. The square sold for $1,200, but the sale was never completed.

Q. That fronted on Hagan avenue.

A. Fronting on Hagan avenue.

Q. Between what streets?

A. I can't remember the streets, but if I saw the map, I could tell you.

Q. Is it near Mr. Chadwick's property?

A. I think it is what they call cata-cornered.

Q. At public auction it was put up, and how much a lot did it bring?

A. The whole square was bid off for $1,200.

Q. How many lots?

A. I don't know.

Q. Was the sale completed?

A. It was not completed, but I was informed a few days ago that it would be completed early in March.

Q. Was this after the construction of the shell road?

A. Yes sir.

Cross-examination by Mr. BAYNE:

Q. Was the square of ground which you speak about filled or not filled?

A. No sir, it was not filled.

Q. How long had your company owned that square of ground?

A. I don't remember exactly; four or five years. I have been secretary a year and a half.

Q. How much did your company purchase it for?

A. I don't know without looking at the deeds. I don't know what I was summoned here for at all.

Q. Do you know how much you purchased it for?

A. No sir.

Q. I would like to know for how much.

A. My impression is that it was purchased in connection with one or two other squares and so much for so many squares.

Q. Did you make any profit on that transaction?

A. I suppose if the sale went through, we would.

Q. If the sale goes through will you make a profit?

A. I suppose the company will.

41 Q. If the sale is completed at $1,200 it will be greater than the price for which you purchased the property?

A. Yes sir.

Q. But you don't know how much greater?

A. No sir, I don't.

By Mr. BRIGHT:

Q. Would there be a profit after taking off the cost of the shell road?

A. I think there would be at those figures.

J. M. KELLY, Esq., the plaintiff, recalled, in rebuttal, in his own behalf, did depose and testify as follows:

Direct examination by Mr. BAYNE:

Q. Mr. Kelly, it has been stated here that the paving of Hagan avenue from Canal street to Esplanade avenue, called for under this contract, was not completed to Esplanade avenue; why was that?

A. The street has never been opened. The city will have to buy or expropriate property in order to cut a street through.

Q. Wasn't such an expropriation contemplated at the time you took the contract?

A. I presume so, I don't know.

Q. Are you ready to complete this paving as soon as the street is opened to Esplanade avenue?

A. Yes sir. I have spoken to the city engineers about opening it, and they can't tell me when.

Q. Have you ever abandoned the work?

A. No sir.

Q. Have you completed the work in front of Mr. Chadwick's property?

A. Yes sir.

Q. Mr. Kelly, did you have anything to do with prescribing at what level the pavement should be made?

A. No sir, the city engineer did that.

Q. Were you consulted in any way, in the matter?

A. No sir, he gave me the lines and we built the road by his lines and levels.

Q. Is it the city's grade that the road is built at?

A. Yes sir—fixed grade.

Q. Did you have any discretion in the matter as to what
42 grade you would build that road?

A. No sir, none whatever.

Evidence closed.

Case continued, by preference, for argument.

Assignment to J. M. Kelly by A. J. Christopher for the Contract of Paving of Hagan Avenue from Canal Street to Esplanade Street, of Date April 15th, 1896.

Offered in evidence by counsel for plaintiff. Filed *nunc pro tunc* as of date Feb. 5, 1898.

New Orleans, March 23rd, 1900.

Transfer or Assignment.

NEW ORLEANS, *April 10th*, 1896.

For value received, I hereby transfer and assign to J. M. Kelly or order, all my right title and interest in and to the claim due me by the city of New Orleans, amounting to — in conformity with ordinance No. 2066 administration series as described below.

No. of assignment.	No. of ordinance.	Description of claims.	Amount.
		Claim for the full amount of my contract with the city of New Orleans for paving Hagan Av. from Canal to Esplanade St. (river side) with shells.	

(Signed) A. J. CHRISTOPHER.

COMPTROLLER'S OFFICE,
CITY HALL, N. O., *April 10th*, 1896.

I hereby certify that the original of this transfer is on file in this department, under No. 1346.

WM. E. McNEIL,
Comptroller ad Int.

43 Continued.

Extract from Minutes, Division "C."

WEDNESDAY, *February 2nd*, 1898.

Present: Honorable F. A. Monroe, judge.

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

This case came up for trial this day.
Present: Hugh L. Bayne Esq., for plaintiff; Geo. L. Bright, Esq. for defendant.

And after hearing pleadings and the evidence, the case was continued with preference for argument of counsel.

Continued.

Extracts from Minutes, Division "C."

WEDNESDAY, *February 16th*, 1898.

Present: Honorable F. A. Monroe, judge.

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

For cause this case fixed for argument on this day, was ordered continued to Wednesday, March 2nd, 1898, at 11 o'clock a. m.

Continued.

Extract from Minutes, Division "C."

WEDNESDAY, *March 2nd*, 1898.

Present: Honorable F. A. Monroe, judge.

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

The argument in this case was postponed to Thursday, March 10th, 1898.

Motion to Fix for Argument.

Filed December 19th, 1898, and entered on minutes of same day.

44 Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

On motion of Geo. L. Bright counsel for defendant, it is ordered that this cause be assigned for argument on Jan'y 4th, 1899, at 11 a. m. and that the plaintiff or his counsel Messrs. Denegre, Blair — Denegre, be notified thereof.

Continued.

Extract from Minutes, Division "C."

WEDNESDAY, *January 4th*, 1899.

Present: Honorable F. A. Monroe, judge.

Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

The argument in this case was postponed to January 18th, 1899.

Continued.

Extract from Minutes, Division "C."

WEDNESDAY, *January 18th*, 1899.

Present: Honorable F. A. Monroe, judge.

Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

This case fixed for argument on this day was ordered continued to be again fixed for hearing.

45 *Supplemental and Amended Answer & Order of Court.*

Filed September 1st, 1899.

Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

Now comes into court the defendant E. H. Chadwick, and with leave of the court first obtained files this amended and supplemental answer.

He denies the existence of the ordinance alleged in plaintiff's petition, and if any is shown he charges that it is unconstitutional and illegal for the reasons set forth in defendant's answer, and further because;

1. The ordinance provides that all persons who had not paid a city license are denied the right to bid for the work, and provides that their bids would not be considered.

2. Because, the ordinance, including the specifications requires, each property-owner to pay for the quantity and quality of materials, & cost of work in front of his property, and not for his proportion of the whole work according to frontage.

3. Because the ordinance and specifications require the contractor to employ only *bona fide* resident citizens of the city of New Orleans as laborers on the work, and it deprives the citizens of this State and of each and every State, and the inhabitants thereof of their privileges and immunities of citizens in the several States, secured to them by the Constitution of the United States, sec. 2, which provides the citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States.

4. Because the city charter provides that the work shall be given to the lowest bidder, and the ordinance and specifications excludes the lowest bidder, and do not admit of competitive bidding.

5. Because the ordinance imposes a liability on the property-

owner irrespective of the question whether or not his prop-
46 erty is benefited or damaged by the pavement.

This defendant prays for judgment in his favor and against the plaintiff and for general relief.

(Signed) GEO. L. BRIGHT,
Counsel for Defendant.

Order of Court.

Let this amended and supplemental plea and answer be filed as prayed for.

New Orleans, September 1st, 1899.

(Signed) JOHN ST. PAUL, *Judge.*

Motion to Fix Case.

Filed December 4th, 1899, and entered on minutes of same day.

Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

On motion of Geo. L. Bright att'y for the defendant, it is ordered that this cause be assigned for argument for Monday 11th December 1899 at 11 a. m. and that the plaintiff or his counsel Messrs. Denegre, Blair & Denegre be notified thereof.

Supplemental & Amended Petition & Order of Court Thereon.

Filed December 8th, 1899.

Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

The supplemental and amended petition of the said plaintiff filed with leave of the court first had and obtained, respectfully represents:

47 That, since the evidence in this case was closed, the supreme court of this State, in a certain cause entitled The Barber Asphalt Paving Company *vs.* John Watt, No. 12927 of the docket of said court, has passed upon and decided the principal issues involved in this cause; and in said cause said court has decided that the property-owners' proportion of the cost of paving a street should be determined by ascertaining the entire cost of the work assessable to the property fronting thereon, and apportioning the same to said property in proportion to foot frontage; that said decision has revealed to plaintiff that the city engineer's computation of the amount due by defendant was erroneous, in that the cost of one block, instead of

the entire work, was taken as the basis of apportionment according to foot frontage, the result being that the amount claimed in his original petition was in excess of the amount due by defendant under the law as construed by the supreme court as aforesaid. That plaintiff desires to amend his petition by reducing the amount of his claim to five hundred and ninety-five and $\frac{54}{100}$ ($595.54) —; and he avers that the total cost of said paving work assessable to property fronting thereon was $10,519.22; the total frontage of the property thereon and subject to assessment therefor was 5,425.21 feet; and the amount chargeable per lineal foot to property fronting thereon was $1.93895. That said last-named amount, multiplied by 307.2 feet, the frontage of defendant's property, produces $595.54, and which plaintiff now claims of defendant.

Wherefore petitioner prays for leave to file this amended and supplemental petition; that defendant be duly cited to appear and answer the same; and that, after due proceedings had, he have judgment as prayed for in his original petition except that the amount of said judgment be for the sum of five hundred and ninety-five and $\frac{54}{100}$ dollars, instead of six hundred and thirty-four and $\frac{80}{100}$ dollars; and he further prays for general relief.

(Signed) DENEGRE, BLAIR & DENEGRE,
Att'ys for Petitioners.

48 *Order of Court.*

Let the supplemental petition be filed without prejudice to defendant's right to object thereto.

New Orleans, Dec. 8, 1899.

(Signed) JOHN ST. PAUL, *Judge.*

Bill to Reopen Case.

Filed December 8th, 1899, and entered on minutes of same day.

Civil Dist. Court, Div. C.

JOHN M. KELLY
vs. } No. 53078.
EDMUND H. CHADWICK.

On motion of Denegre, Blair and Denegre, attorneys for plaintiff herein, and on suggesting to the court that they have amended their original petition, reducing the amount claimed in order to conform to the rule laid down by the supreme court of this State for the ascertainment of such paving assessments, in a cause decided since the evidence in this case was closed, and that it is necessary that this case be reopened, in order that evidence may be adduced to prove the conformity of said reduced claim with the rule announced by the supreme court as aforesaid.

It is ordered that defendant show cause on Monday December 11th, 1899, at 11 a. m. why said cause should not be reopened for the purpose above stated.

Bill of Exception.

Filed December 11th, 1899.

Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

49 Be it remembered that on the 11th, Dec., 1899 the motion made by pl'ff to file a supplemental and amended petition came up for trial and defendant objected thereto upon the ground that the application came too late, it came after the cause had been tried and assigned for argument—it changed the issue and evidence was not admissible to sustain the allegations in the petition,—and no cause of action was set forth in the pleadings.

The court overruled the objection permitted the supplemental and amended petition to be filed, and to the ruling of the court defendant excepted and tenders this his bill of exceptions for the signature of the court after submitting it to counsel for plaintiff.

N. O., Dec. 11, 1899.

(Signed) JOHN ST. PAUL, *Judge.*

Rule to Reopen Case Made Absolute.

Extract from Minutes, Division "C."

MONDAY, *December 11th*, 1899.

Honorable John St. Paul, judge.

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

The rule to reopen case came up on this day.

Present: J. P. Blair, Esq. for plaintiff. Geo. L. Bright, Esq., for defendant.

And after hearing pleadings and arguments of counsel, the court considering that for final determination of this case between the parties thereto, the prayer of the mover should be granted and for the reasons orally assigned.

It is ordered that plaintiff's rule be made absolute and that his supplemental petition be filed as herein ordered, and that this case be reopened for the purpose of allowing plaintiff to make the correction mentioned in his rule and supplemental petition, and
50 in the meantime this case is continued with preference.

Supplemental and Amended Petition (Second) & Order of Court Thereon.

Filed December 14th, 1899.

Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

The second supplemental and amended petition of said plaintiff, filed with leave of court first had and obtained, respectfully represents:—

That he desires to correct a mistake in calculation made in his first supplemental and amended petition, wherein he stated that the total cost of said paving work assessable to the property fronting thereon was $10,519.22, the total frontage of property thereon and subject to assessment thereof was 5,425.21 feet, and the amount chargeable per lineal foot to property fronting thereon was $1.93895.

That he has since ascertained, and now avers, that the foregoing figures did not include that portion of the work contracted for, and a necessary incident of the paving work, which consisted of curbing wings, etc., and the lumber used for such work, adjacent to the sidewalks along the said street to be paved; that the entire cost of said work was $1,893.75, or $0.34906 per lineal foot. That accordingly, the amount chargeable per lineal foot to property on said paving street was not $1.93895 but $1.93895 plus $0.34906, making the total due by defendant's property, having a frontage of 307.2 feet, the sum of $702.86 which is the true amount due plaintiff.

That plaintiff is willing to avoid confusion, to waive the excess of what is due as aforesaid over the sum shown to be due by the certificate of the city engineer filed as exhibit of *its* original
51 petition, in order that he may have judgment for the amount originally prayed for.

Wherefore plaintiff prays for leave to file this his second supplemental and amended petition; that defendant be duly cited to appear and answer this petition; and, after due proceedings had, he have judgment as prayed for in his original petition; and for costs and general relief.

(Signed) DENEGRE, BLAIR & DENEGRE,
Att'ys for Petitioner.

Order of Court.

Let this supplemental and amended petition be filed, without prejudice to any right which defendant may have in the premises.

New Orleans, La., December 14th, 1899.

(Signed) JOHN ST. PAUL, *Judge.*

Peremptory Exceptions and Answers to Plaintiff's Supplemental Petitions.

Filed December 28th, 1899.

Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

Now comes into court, the defendant E. H. Chadwick and to the first and 2nd, supplemental petitions of the plaintiff, and to his original petition, (reserving all objections to said supplemental petitions) *and* peremptor-y demurs and excepts thereto for the general reasons that:

The matters therein contained and as in them stated and set forth are insufficient in law for the said plaintiff to have and maintain this action.

And specially because the pretended ordinances of the city of New Orleans as recited in plaintiff's petition, and his alleged contract are illegal and unconstitutional, and therefore null and
52 void for the reasons set forth in the answer and supplemental answers heretofore filed which this defendant reiterates in the same manner as if they were again herein specially set forth.

He alleges that the city ordinance and specifications require the contractor to employ only *bona fide* resident citizens of the city of New Orleans as laborers on the work and is therefore contrary to the constitution of the State of La. and to article IV, sec. 2 of the Constitution of the United States (which provides)

SECTION 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,

and to the XIV amendment of the Constitution of the United States which provides

"ART. XIV, SEC. 1. All persons *or* born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, no*w* deny to any person within its jurisdiction the equal protection of the laws."

And this defendant shows that the paving of the street in front of his property has been of no benefit to it, on the contrary has damaged it, and the rendition of any judgment against him is taking his private property for public purposes and is contrary to the constitution of the State of La. art. 167 which provides

"ART. 167. Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid,"

and contrary to the Constitution of the United States art. V, which provides that no person shall be deprived of life liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

And for answer to the said first and supplemental petition this defendant pleads the general issue, and prays for judgment in his favor and against the plaintiff and further that all liens and
53 privileges record*ing* against defendant and his property to secure plaintiff's claim in the office of the recorder on 5 Oct., 1896 in Book 572 fo. 374 be erased, cancelled and annulled, and he prays for general relief.

(Signed) GEO. L. BRIGHT,
Counsel for Def't.

Civil District Court, Division "C."

J. M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

Testimony and Notes of Evidence Taken in Open Court Before the Hon. John St. Paul, Judge, on the 22nd Day of January, A. D. 1900, on Behalf of Plaintiff.

Appearances: Messrs. Denegre, Blair & Denegre, for plaintiff. Geo. L. Bright, Esq., for defendant.

HUNTER STEWART, Esq., sworn by the minute clerk, on behalf of plaintiff, did testify as follows:

Direct examination by Mr. BLAIR:

Q. What is your occupation, Mr. Stewart?
A. I am chief clerk in the city engineer's office.
Q. How long have you been so occupied?
A. A little over a year.
Q. Before that time, what were you?
A. I was the assistant city engineer.
Q. Were you the assistant city engineer in the year 1896?
A. Yes sir.
Q. And were you in the year 1895?
A. No sir, from May 1896 to 1899.
Q. Will you look at this certificate which I show you (witness shown certificate No. 42 from the city engineer's office, dated
54 December 13th, 1899) and state whether you know the signatures thereto, and if so, whose signatures they are?

By Mr. BRIGHT: Is this a new certificate?
By Mr. BLAIR: Yes sir.

A. To the best of my knowledge, A. C. Bell, city engineer, and W. L. McGary, commissioner of public works.
Q. Well, you know their handwriting?
A. Yes sir.

Q. It is their signatures?
A. Yes sir.

Counsel now, under the allegations of the first and second supplemental petitions, offers, produces and files in evidence the certificate just identified by the witness marked supplemental offer No. 1.

Counsel for defendant objects upon the ground, that the certificate is not admissible to prove the contents of the document; that the evidence is not admissible under the original petition, and is irrelevant and inadmissible to change the terms and conditions of the contract under which the plaintiff claims, and because, if the plaintiff cannot recover under the terms of the contract, he cannot otherwise recover. That the plaintiff having offered and filed the certificate of the city engineer and the commissioner of public works, without objection from the defendant, and the defendant having offered no evidence in contradiction thereof, the plaintiff cannot offer evidence tending to prove an indebtedness to him, otherwise than by reason of said certificate, and cannot be permitted to prove the indebtedness to him, and determine in any manner from that, established and specified by the contract.

2nd. Because the supplemental petitions are too vague and indefinite and do not show of themselves that the plaintiff is entitled to the amount claimed.

3rd. Because the court erred in permitting the plaintiff to file the supplemental petitions.

The COURT: The court overrules the objections.

To which ruling of the court counsel for defendant excepts and has this note made in lieu of his bill of exception.

55 By Mr. BLAIR: Counsel for plaintiff offers, produces and files in evidence a certified copy of the ordinance No. 11849 C. S. approved January 30th, 1896.

By Mr. BRIGHT: Counsel for defendant objects upon the ground that the case was opened for a special purpose, and that no evidence, except for that purpose is admissible.

By Mr. BLAIR: If your honor please, this ordinance is offered for the purpose of making it clear and showing beyond doubt that this suit is brought in the name of the present plaintiff, and not in the name of the city of New Orleans, and counsel asks the court in its discretion to permit the offering of the ordinance for the purpose named; that is to show that the contractor who stands in the shoes of the city, is the proper party in whose name the suit should be brought.

By the COURT: You wish to introduce it for that purpose?

By Mr. BLAIR: Yes your honor.

By the COURT: I will hear the case without the ordinance.

By Mr. BRIGHT: I ask that the evidence be excluded.

By the COURT: I will exclude the ordinance.

Mr. BLAIR: To which ruling of the court counsel for the plaintiff excepts, and reserves this note in lieu of a formal bill of exceptions, and asks leave of the court to annex thereto and file herewith, for

the purpose of having the same go up as a part of the bill of exceptions, the ordinance included in the offer made.

The COURT: The request is granted.

Cross-examination by Mr. BRIGHT:

Q. Mr. Stewart, do you know of your own personal knowledge, the quantity of material furnished for the fulfillment of this contract?

A. Yes sir.

Q. What do you know?

A. I know that they required a certain amount of lumber, shells and filling to have completed that work, and it was completed in accordance with the lines and levels furnished by me, and an inspection made under me, and the material was put upon the street
56 I am satisfied.

Q. What knowledge have you of the number of feet of lumber furnished?

A. I have knowledge, obtained by measuring the amount placed.

Q. Did you do the actual measurement?

A. It was done under my direction and supervision, part by me and part by my men.

Q. Did you do the actual measurement?

A. Part of it.

Q. What part of it did you measure?

A. I measured all the lumber that was in the curbing.

Q. What was the amount of your measurement.

A. It is stated there. The details—the totals are put down there; it is impossible for me to remember the amounts.

Q. Did you measure it all?

A. I didn't hold both ends of the tapeline, but I am responsible for the measurements.

Q. Did you hold one end of the tapeline during the whole of the measurements?

A. No sir; I stood there and saw the two men measure it.

Q. Did you do that for the whole amount of lumber?

A. Yes sir.

Q. Without any exception?

A. I can't say; I had my inspectors to report the amount.

Q. Did you put it down yourself, and at the time when the measurements were made.

A. I may have put it down at the time.

Q. Two or three times?

A. No sir, only once.

Q. Did you put down the whole of it?

A. I don't think that all was put together.

Q. Did you, yourself actually measure the number of yards of shell pavement?

A. Well, it was measured under me, you understand.

Q. What do you mean by "myself"?

—. ——.

Q. That you were present doing it yourself?

A. I was present at the time it was made.

Q. When the whole amount of the shells was made were you present?

A. Yes sir.

57 Q. You were not absent at any time?

A. When the final measurements were taken for every two blocks they would report that they were ready, and I had it measured up.

Q. Did you measure it yourself. I want to know what you did yourself, not what other people did?

A. The engineering force do this in a different manner. I had my men to run the tape, and saw that they measured it, and I put the measurements down.

Q. Did you do that throughout the whole work, without any exception?

A. I don't remember any place where I did not.

Q. What was the number of cubic yards of pavement?

A. There are so many of those things that we have to do, that I don't remember each and every one.

Q. Did you keep an account of it at the time?

A. Yes sir.

Q. Where is that account?

A. That account is in the note books at the city hall.

Q. Can you produce it?

A. Yes sir.

By Mr. BRIGHT: I call upon the witness to produce it.

A. I cannot, unless you send for the records at the city hall, by order of court.

Q. As to the filling, how did you measure that filling?

A. If I remember correctly, the contract stated that the contractor was to put as much as six inches of filling, without any extra cost, and anything above that was to be paid for by the city, or under the contract, at a certain rate per cubic yard, at cross-sections, getting the elevation of the street before the improvement was made, upon which we placed sections of the street when completed.

Q. Did you make the measurement of the required filling, before the filling was done?

A. Yes sir, we opened the sections of the street as it were before the improvement was made—we obtained them.

Q. Did you make that yourself?

A. My assistant took the cross-sections.

58 Q. You didn't make it yourself?

A. No sir.

Q. Did you make the measurements of the filling after it was put there?

A. No sir; it is obtained by deductions; a certain amount of filling required to be up to a certain grade, and when the street is put to that grade we know the filling is put there.

Q. Do you say that the contractor did actually pay for that grade?

A. Yes sir.

Q. Have you any personal knowledge of about how many cubic yards of filling he used?

A. I have no recollection of the amount.

Q. Were you there when he put it there?

A. No sir; I had a representative there at the time.

Q. What portion of your time did you superintend the work?

A. Whenever the work required my presence there, I went there.

Q. When did the work require your presence there?

A. Well, whenever—it depended on the weather, just according to my own judgment, to see that the work went on properly. I had an inspector to represent me when I was not there.

Q. In whose handwriting is this certificate marked "Supplemental" offer No. 1?

A. One of the clerks in the city engineer's office.

Q. Can you, without that document give us the information that the document possesses?

A. No sir, not all the data.

Q. Can you give us any portion of it without the document?

A. I can give you the general result, yes sir.

Q. Well, what was the general result?

A. The general result to the best of my recollection is, that the cost of a foot front to the property-holders, is $2.28 altogether, including curbing and everything, to the best of my recollection.

Q. Do you recollect any other item in this document but that?

A. No sir.

Q. How long was this contractor occupied in doing this work?

A. I can't tell you that from memory, but we have the records in the city hall.

Q. Were you there every day when he was doing the work?

59 A. Not every day.

Q. How often were you there?

A. Well, I went there as often as the exigencies of the work required. Sometimes when he was putting in his curbing, and had his lines in grade the inspector could attend to that as well as I could, but if the work was important I would be there.

Q. Did he complete his contract from Canal street to Esplanade street?

A. No sir, only as far as De Soto street.

Q. How far from Esplanade street is De Soto street?

A. De Soto and Hagan, you would have to open the grand route St. John, and then to Esplanade, that would be two small blocks.

Q. Then he didn't complete his work from Canal street to Esplanade street?

A. He was not called upon to do so by the city; there was no street for him to pave.

By Mr. BLAIR:

Q. Do you mean that the street stopped at De Soto street?

A. Yes sir.

By Mr. BRIGHT:

Q. The contract went to Esplanade street?
A. (No answer.)

NOTE.—Continued two weeks for argument.

I certify the foregoing to be a true and correct copy of testimony, 7 pages, taken on the trial hereof.

A. E. OLIVEIRA, *Stenographer.*

Certificate from the City Engineer's Office, Marked Supplemental Offer No. 1.

Offered in evidence by counsel for plaintiff. Filed January 22nd, 1900.

No. 42. CITY ENGINEER'S OFFICE, CITY HALL,
NEW ORLEANS, *December 13th*, 1899.

This is to certify, that A. J. Christopher contractor for paving Hagan avenue from Canal street to Esplanade avenue with lake shells as per ordinance No. 12136 of the city council adopted
60 March 31st 1896, has constructed certain work under his contract and that there is now due him by Edmund H. Chadwick for his portion of work done of Hagan Avenue street, between Carondelet Walk street and Toulouse street, as itemized below, the sum of seven hundred and two $\frac{88}{100}$ dollars, with interest at the rate of 6 % per annum from date of old certificate until paid.

Lumber 58,693, B. M. at 435 per M.....	$2,054.25
Shell pavement 9,187.65 sq. yds. at $1.35 per sq. yd.....	12,403.33
Filling 55.95 cu. yds. at $0.90 per cu. yd.....	50.35
Total cost of pavement.....	$14,507.93
City's portion.....	3,988.71
Property-holders' portion.....	$10,519.22

Total length of property frontage 5,245.21 feet.
Cost per foot front $1.93895.
Extra lumber in sidewalk curb 54,107 ft. B. M. at $35 per M. $1,893.75.
$1,893.75 : 5,245.21—$0.34906 per ft. front.

Your proportion of cost.

Pavement 307.2 ft. front at $1.93895 per ft. front.....	$595.65
Curbing 307.2 ft. front at $0.43906 " " "	107.23
Total.....	702.88

This certificate is issued in lieu of certificate No. 42 dated September 24th, 1896, and the cost is apportioned in accordance with the decision of the supreme court of the State of Louisiana, rendered in

the case of The Barber Asphalt Co. *vs.* John Watt being No. 12927 of the docket of said court, final judgment May 29, 1899.

New Orleans, Dec. 13, 1899.

Approved.

(Signed) W. L. McGARY,
Commissioner of Public Works.

Approved.

(Signed) A. C. BELL,
City Engineer.

Ordinance No. 11849 (*Copy*), *Annexed to and Made Part of Plaintiff's Bill of Exceptions.*

Filed January 22nd, 1900.

61 MAYORALTY OF NEW ORLEANS,
CITY HALL, *Jan.* 30, 1896.

No. 11849, council series.

An ordinance relative to the paving of Hagan avenue, from Canal street to Esplanade avenue, with lake shells, under act 119 of 1886, as amended by act 142, of 1894.

Whereas, the council did, by ordinance No. 11184 C. S. announce its intention to direct the pavement of Hagan avenue from Canal street to Esplanade avenue, with lake shells, under the provisions of act 119, of the Acts of 1886, as amended by act 142, of 1894, and to levy an assessment for three-quarters of the cost thereof on the front proprietors on said street according to frontage; and did, by said ordinance, direct the clerk of the council to publish notice of said intention in the official journal, once a week, for four weeks, and whereas, the said publication of notice of intention has been made in due form of law and official notice thereof brought to this council.

SECTION I. Be it ordained by the common council of the city of New Orleans, two-thirds of all the members thereof concurring, That the city engineer is hereby instructed to immediately prepare plans and specifications for the paving of above-named streets with the lake shells, and report the same to the council.

SEC. II. Be it further, etc., That as soon as said plans and specifications are approved by this council, the comptroller is ordered and directed to advertise for ten days for bids for the paving of above-named streets with lake shells, according to said plans and specifications, and under the provisions of this ordinance, the council reserving the right to reject any or all bids.

SECTION III. Be it further ordained, That the cost of paving said street, as herein provided, and as established by the accepted bid shall be borne by the whole of the city of New Orleans; but that, in accordance with the provisions of act No. 114, of the Acts of 1886, as amended by act 142 of 1894, there is hereby forced imposed
62 and levied on all the front proprietors of lots fronting on said street, three-fourths of the cost of said improvement and pavement, exclusive of the cost of intersections, said assessment to be

levied on properties to the frontage of each property on said street, and to bear thereon as a first privilege, superior to the vendor's lien, and all other privileges and mortgages.

SECTION IV. Be it further ordained, That as soon as said improvement and pavement is completed and accepted, square by square, the city engineer and commissioner of public works, be directed to measure or cause to be measured, the frontage of each front proprietor on such completed and accepted squares and to prepare and record in the mortgage office of the parish of Orleans, a certificate charging each front proprietor with three-fourths of the cost of the said improvement in front of his lot, which said certificate shall be made payable in favor of the contractor who should do said work as hereinafter provided and which said certificates shall bear interest at the rate of six per cent. per annum from date until paid.

SECTION V. Be it further ordained, That no bid shall be received from any contractor for paving of said street as herein provided, unless he shall consent in his bid to receive the certificates, so ordered above to be prepared by the city engineer and commissioner of public works, for such proportion of the price, as said certificates shall bear to the cost of the whole work. In other words, while the city contracts with the contractor to do this work at the whole expense of the city, the said contractor is to consent to take in part payment of the price of said contract, the certificates of assessment hereby levied against the property-holders fronting on said street, to the amount and extent of said certificates. Similar certificates are to be prepared against the city for the cost of intersections and the other quarter of the pavement in front of private property, but the same are not to be recorded.

SECTION VI. Be it further ordained etc., That said certificates shall be due and demandable in favor of said contractor as soon
63 as the same are issued as above provided, and any contractor to whom this contract is adjudicated is hereby specially subrogated to all rights, privileges, liens, claims and demands of the city of New Orleans, in and into the local assessments herein made upon the properties fronting on said street, and in and to the certificates aforesaid, with full power and authority to sue on said certificates or on the said local assessment in his own name, or in the name of the city of New Orleans.

Adopted by the council of the city of New Orleans Jan. 28, 1896.

DAN. A. ROSE,
Clerk of Council.

Approved Jan. 30, 1896.

JOHN FITZPATRICK, *Mayor.*

A true copy:

CLARK STEEN,
Secretary to the Mayor.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *March* 29, 1900.

I hereby certify that the above ordinance No. 11849 C. S. is a true and correct copy of the original ordinance on file in this office.

J. S. WATERMAN,
Secretary to the Mayor.

Continued.

Extract from Minutes, Division "C."

MONDAY, *January 22nd*, 1900.

Present: Honorable John St. Paul, judge.

JOHN M. KELLY
vs. } No. 53078.
EDMUND H. CHADWICK.

The trial of this case was resumed on this day.

Present: Messrs. Denegre, Blair & Denegre, for plaintiff; Geo. L. Bright, Esq. for defendant.

64 And the evidence having been closed, the case was continued with preference, for argument of counsel.

Submitted.

Extract from Minutes, Division "C."

MONDAY, *February 5th*, 1900.

Honorable John St. Paul, judge.

JOHN M. KELLY
vs. } No. 53078.
EDMUND H. CHADWICK.

After hearing argument of counsel for all parties, this case having been submitted, the court took same under advisement.

Judgment.

Civil District Court, Division "C."

JOHN M. KELLY
vs. } No. 53078.
EDMUND H. CHADWICK.

In this case submitted for adjudication, the court considering the law and the evidence to be in favor of the plaintiff, and against the defendant and for the reasons orally assigned, in open court, on this day.

It is ordered, adjudged and decreed that there be judgment in favor of the plaintiff, John Kelly and against the defendant, Edmund H. Chadwick, for the sum of six hundred and thirty-eight $\frac{80}{100}$ dollars, with six per cent. interest thereon from September 24th,

1896, until paid and all costs of suit; the whole with recognition of plaintiff's lien and privilege for the payment thereof on the following-described property: five certain lots of ground situated in this city, in the square bounded by Hagan avenue, Toulouse, Rendon streets and Carondelet walk; lot No. 1, situated on the corner and formed by said Carondelet walk and Hagan avenue, with a depth and front on Carondelet walk of 31 feet and a depth and front
65 on Hagan avenue of 100 feet between parallel lines; lots 2, 3, & 4, adjoining said lot No. 1, and having a frontage respectively of 35 feet 8.6 inches, 35 feet 8.7 inches and 35 feet 8.7 inches or a combined frontage of 107 feet 2 inches on Hagan avenue and each with a width of 154 feet 8 inches between parallel lines; and lot No. 5, adjoining said lots last described and having a front and depth on Hagan avenue of 100 feet and a front on Toulouse street, of which it forms a corner of 31 feet between parallel lines, and on the proceeds thereof, the said property to be sold and the proceeds applied to the payment of the plaintiff's claim as herein adjudged.

Judgment rendered March 5th, 1900.

Judgment signed, March 9th, 1900.

(Signed) JOHN ST. PAUL, *Judge*.

Judgment Signed.

Extract from Minutes, Division "C."

FRIDAY, *March 9th*, 1900.

Present: Honorable John St. Paul, judge.

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

The judgment in this case rendered on the 5th day of March 1900, was signed in open court on this day.

Motion for Suspensive Appeal.

Filed March 19th, 1900, and entered on minutes of same day.

Civil District Court, Division "C."

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 53078.

66 On motion of Geo. L. Bright, attorney for the defendant and on suggesting to the court that he is advised there is error to his prejudice in the judgment herein rendered against him on the — and signed on the 9th March, 1900 and he desires to appeal therefrom to the supreme court of the State of Louisiana.

It is ordered by the court that a suspensive appeal be granted to the defendant, Edmund H. Chadwick returnable to the supreme

court of the State of Louisiana on the first Monday of April 1900 on furnishing bond according to law.

O K.

ST. PAUL.

Bond of Appeal.

Filed March 19th, 1900.

Know all men by these presents that, we E. H. Chadwick as principal and Francis A. Chadwick as surety are held and firmly bound unto Paul O. Guerin, clerk of the civil district court for the parish of Orleans, his successors, executors, administrators, and assigns in the sum of fifteen hundred ($1,500) dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated in the city of New Orleans, on the 19th, day of March, in the year of our Lord one thousand nine hundred.

Whereas, the above-bounded E. H. Chadwick have this day filed a motion of appeal from a final judgment rendered against him in the suit of John M. Kelly *vs.* E. H. Chadwick No. 53078, of the civil district court for the parish of Orleans, on the 5th, day of March 1900, and signed on the 9th day of March 1900.

Now the condition of the above obligation is such, that the above-bound E. H. Chadwick shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him or that the same shall be satisfied by the proceeds of his estate real or personal, if he be cast in the appeal; otherwise that the said Francis A. Chadwick shall be liable in his place.

(Signed) E. H. CHADWICK.
F. A. CHADWICK.

Signed, sealed and delivered in the presence of

67 (Signed) H. C. CARTER.

Certificate.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, Jas. C. Peyton deputy clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing seventy-four (74) pages do contain a true, correct and complete transcript of all the proceedings had, documents filed, and evidence adduced upon the trial of the cause wherein, John M. Kelly is plaintiff and Edmund H. Chadwick is defendant, instituted in this court and now in the records thereof under the No. 53078 of the docket of this honorable court division "C," Honorable John St. Paul, judge.

In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this second day of April, in the year of our Lord one thousand nine

hundred and in the one hundred and twenty-fourth year of the Independence of the United States of America.

JAS. C. PEYTON,
Deputy Clerk.

68 *Proceedings Had in the Supreme Court of the State of Louisiana.*

Appeal (suspensive) — Edmund H. Chadwick from judgment rendered against him on the 5th day of March, 1900, and signed on the 9th day of March, 1900.

Civil District Court, Division "C"—Honorable John St. Paul, judge.

JOHN M. KELLY
vs. } No. 53078.
EDMUND H. CHADWICK.

Transcript of Appeal Filed.

Supreme Court for the State of Louisiana.

JOHN M. KELLY
vs. } No. 13505.
EDMUND H. CHADWICK.

Filed April 3rd, 1900.
(Signed) PAUL E. MORTIMER,
Deputy Clerk.

Motion to Dismiss.

Supreme Court for the State of Louisiana.

JOHN M. KELLY
vs. } No. 13505.
EDMOND H. CHADWICK.

Now into this honorable court, by Denegre, Blair & Denegre, his attorneys, comes John M. Kelly, plaintiff and appellee herein, and moves the court to dismiss the appeal herein on the ground that this court has no jurisdiction of the appeal *ratione materiæ*, as appears upon the face of the record and upon the authority of the decision of this court in the case of Rosetta Gravel & Improvement Company *vs.* Adler, No. 13227 of the docket of this court.

(Signed) DENEGRE, BLAIR & DENEGRE,
Att'ys for Plaintiffs and Appellee.

(Endorsed:) No. 13505. Supreme court of Louisiana.
69 John H. Kelly *vs.* Edmond H. Chadwick. Motion to dismiss. Filed April 5th, 1900. (Signed) Paul E. Mortimer, deputy clerk. Fixed for Monday April 23rd, at 11 a. m. Rec'd notice Ap'l 5, 1900. (Signed) Geo. L. Bright att'y for def't. (Signed) Denegre, Blair & Denegre, att'ys.

Cause Submitted on Motion to Dismiss.

(Extract from the Minutes.)

NEW ORLEANS, MONDAY, *April 23rd*, 1900.

The court was duly opened, pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice, Lynn B. Watkins, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, associate justices.

JOHN M. KELLY
vs. } No. 13505.
EDMUND H. CHADWICK.

This cause came on this day to be heard on the defendant's motion to dismiss the appeal herein taken by the plaintiff, whereupon the same was submitted to the court by counsel upon the briefs now on file for the parties in interest.

Opinion of the Court on the Motion to Dismiss.

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

NEW ORLEANS, MONDAY, *May 7th*, 1900.

The court was duly opened, pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice, Lynn B. Watkins, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, associate justices.

His honor, Mr. Justice Blanchard, pronounced the opinion and judgment of the court in the following case:

JOHN M. KELLY
vs. } No. 13505.
EDMUND H. CHADWICK.

70 Appeal from the civil district court, parish of Orleans, St. Paul, J.

On motion to dismiss appeal.

The ground of the motion, made by plaintiff and appellee, is want of jurisdiction *ratione materia* appearing on the face of the record, the amount involved being $638.80, or a sum below the minimum jurisdictional limit of this court.

The city of New Orleans let a contract to A. J. Christopher to pave Hagan avenue from Canal street to Esplanade avenue.

As far as it was possible to do so the contract was executed. It was not wholly executed for the reason that Hagan avenue, for a small part of its line between the points indicated, had not been opened as a street.

Christopher transferred his rights and claims under the contract to the plaintiff.

Defendant owned certain lots having a frontage on Hagan avenue along that part of the street paved. An assessment of the amount he was due as front proprietor, under the contract for paving the avenue, was made by the city engineer and commissioner of public works. He declined to pay and this suit was brought to enforce payment.

The petition alleges the contract with Christopher was made, and the paving done, in accordance with act No. 73 of 1876 and with section 37 of act No. 20, approved June 23, 1882, entitled "An act to incorporate the city of New Orleans," etc., as amended by act No. 119 of 1886, as amended by act 142 of 1894, and in accordance with city ordinances Nos. 11184, 11849, and 12136, and other laws and ordinances on the same subject-matter.

It is further averred that, prior to the making of the contract, the resolution to pave the street was passed by the city counsel by a two-thirds vote, and that notice of intention to pave the street and to enact the ordinance relative thereto was published in the official journal once a week for four weeks.

A lien and right of pledge upon the property and its proceeds is claimed.

71 The prayer is for judgment against the defendant for the amount sued for, with interest, and with recognition of the lien claimed upon the property, and condemning the property to be sold and the proceeds applied to the payment of the indebtedness.

A supplemental and second supplemental petition were filed, which, in so far as the motion to dismiss the appeal is concerned, need not be further referred to.

Among other defenses set up, it is averred, on behalf of the defendant, that the city ordinances under which plaintiff claims are unconstitutional and illegal, and the grounds for this charge of unconstitutionality and illegality are set forth in detail and at length.

From the several answers filed by defendant we think it sufficiently and affirmatively charged that the city ordinances, and the contract predicated upon same, transcend the powers and authority granted by the statutes relating to the subject of street paving in the city of New Orleans.

This brings the case, so far as the jurisdictional question raised is concerned, within the rule announced in City of Shreveport *vs.* Prescott, 51 La. Ann. 1895.

In that case, as in this, the assessment, or charge upon property for street improvement was made, or levied, by compulsion of law without regard to the assent or dissent of the abutting proprietors. It was purely a forced contribution, the property-owners having no voice whatever in the matter.

The law under which the proceeding here was taken (section 37 of act 20 of 1882, as amended by act 119 of 1886, as amended by act 142 of 1894) authorized the city council to levy the charge by simple ordinance (a two-thirds vote adopting same), without any precedent application of the owners of property.

The law under which the proceeding in the Prescott case was taken (act 10 of 1896) was, in this respect, the same, save that a majority, instead of two-thirds, vote sufficed to pass the paving ordinance and levy the assessment.

We held, in the latter case, that the forced contribution for street improvement purposes, under such circumstances was a tax
72 in the sense of the constitutional provision conferring appellate jurisdiction upon this court.

So, too, we must hold in the instant case. In the Prescott case the abutting proprietors impeached the validity of the city ordinance on the ground that it imposed a greater burden upon their property than the paving statute, correctly interpreted, permitted. Hence, the illegality of the tax, or forced contribution, assessed against them.

This court, entertaining the view that the ordinance was not in keeping with the terms of the statute, and to the extent not in keeping with it injurious to the abutting owners, annulled the same, reserving to the city council of Shreveport the right to reform the ordinance so as to conform to the law.

Here the like contention is made that the ordinance exceeds the authority bestowed by the statute, and injuriously affects the property-owner.

There is, therefore, presented the issue of illegality, *vel non*, of the tax sought to be collected, and this court has jurisdiction.

Constitution of 1879, art. 81.

Constitution of 1898, art. 85.

The authority relied upon by appellee's counsel to sustain his motion to dismiss—The Rosetta Gravel, Paving and Improvement Company *vs.* Adler, 52 La. Ann. 689—is not in point.

For these reasons it is ordered that the motion to dismiss the appeal be denied.

Judgment Overruling Motion to Dismiss.

(Extract from the Minutes.)

NEW ORLEANS, MONDAY, *May 7th*, 1900.

The court was duly opened, pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice. Lynn B. Watkins, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, associate justices.

His honor, Mr. Justice Blanchard pronounced the opinion and judgment of the court in the following case:

73 JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 13505.

Appeal from the civil district court, parish of Orleans.

For the reasons assigned it is ordered that the motion to dismiss the appeal be denied.

Cause Continued.

(Extract from the Minutes.)

NEW ORLEANS, MONDAY, *November 19th*, 1900.

The court was duly opened, pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice. Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, associate justices. Absent: Lynn B. Watkins, associate justice.

JOHN M. KELLY
vs.
EDMOND H. CHADWICK. } No. 13505.

This case not having been reached today for want of time, the court ordered it to be continued with preference.

Cause Heard and Submitted.

(Extract from the Minutes.)

NEW ORLEANS, MONDAY, *December 17th*, 1900.

The court was duly opened, pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice, Lynn B. Watkins, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, associate justices.

JOHN M. KELLY
vs.
EDMOND H. CHADWICK. } No. 13505.

This cause came on this day to be heard and was argued by counsel: Mr. J. P. Blair opened for the plaintiff and appellee; Mr. George L. Bright and Mr. E. N. Whittemore replied on behalf of the defendant and appellant, and Mr. Blair closed the argument. The court then took the case under advisement upon the briefs for both parties and the papers now on file.

Opinion and Judgment of the Supreme Court.

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

NEW ORLEANS, MONDAY, *February 4th*, 1901.

The court was duly opened, pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, associate justices. Absent: Lynn B. Watkins, associate justice.

His honor, the chief justice, pronounced the opinion and judgment of the court in the following case:

74 JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 13505.

Appeal from the civil district court, parish of Orleans.

Statement of the Case.

The plaintiff sues to recover from the defendant, as owner of property upon Hagan avenue the sum of six hundred and thirty-eight $\frac{8}{100}$ dollars, with recognition that payment of same was secured by lien and privileges on said abutting property, and the proceeds thereof and condemning the property to be sold, and applied to the payment of said claim.

The amount claimed was declared to be the amount due by defendant and the said property as their contributive share of the cost of paving said Hagan avenue, under a contract made by the city of New Orleans and one A. J. Christopher, who had assigned his claims under said contract, to the plaintiff. The amount so claimed was based upon a certificate signed by the city surveyor and commissioner of public works of the city of New Orleans, which "certified that A. J. Christopher, contractor, for paving Hagan avenue with lake shells as per ordinance No. 12136 of the city council, adopted March 31st, 1896, has constructed certain work under his contract, and that there is now due him by Edmund H. Chadwick, for his portion of work done on Hagan avenue (river side) street between Carondelet street and Toulouse street, as itemized below, the sum of six hundred and thirty-eight and eight one-hundredths ($\frac{8}{100}$ths) dollars with interest at the rate of six per cent. per annum from date, until paid.

Lumber 4,355.3 ft. B. M. at $35.00 per M	$151.74
Shells 839.47 sq. yds. at 1.35 per yd	1,133.28
Filling 55.95 cu. yds. at 90c. per yd	50.35
Cost of block	1,335.37
City's portion ¼	333.84
Property-holders'	$1,001.53

75 Mean length of block 287,935 feet.
Cost per lineal foot to property-holders $1.73915.

Your proportion of cost 307.2 lin. ft. at $1.73915 per foot	$534.27
Lumber 2,986.5 ft. B. M. at $35.00 per M	104.53
Total	$638.80

Approved.
A. C. BELL,
City Engineer.

Approved.
W. L. McGARY,
Commissioner Public Works.

Recorded in Mortgage Office Book 572, folio 374.
N. O. October fifth, 1896.
(Signed) GEORGE GUINAULT.

The petition contained allegations in the nature of inducement and others customary in actions of that character.

The cause of action and the pleadings were similar to those in the case of The Barber Asphalt Company *vs.* John Watt, 51st Ann. 1345 and Moody & Co. *vs.* Chadwick, 52nd Ann. 1888, with such changes as would result from the fact that the work constructed, was upon a different street, the contractor was a different person, and the sums involved were different in amount.

Defendant resisted the claim by a number of exceptions and defenses.

The case went to trial, evidence was adduced and the case was continued for argument. While matters were in this situation a decision was rendered by this court in Barber Asphalt Company *vs.* Watt (reported in 51st Annual, 1345) in which it was announced that under the provisions of the paving statute act No. 113 of 1886, owners of property abutting on the street paved, were liable only for their proportion of total cost of paving the street; that they would not be charged with the cost according to their frontage along the front of the square in which their lots were situated. That this was not the rule of apportionment fixed by the statute; that for the sum assessed against their property no personal liability attached to the abutting owners beyond the value of the property affected; that the proceeding was purely one *in rem* acting on the property benefited and none other."

76 Defendant then filed a supplemental answer. He denied the existence of the ordinance alleged in plaintiff's petition, and if any was shown, charged that it was illegal and unconstitutional, for the reasons set forth in his answer originally, and further because:

1st. The ordinance provides that all persons who had not paid a city license are denied the right to bid for the work, and provides that their bids would not be considered.

2nd. Because the ordinance, including the specifications requires, each property-owner to pay for the quantity and quality of materials, and cost of work in front of his property, and not for his proportion of the whole work according to frontage.

3rd. Because the ordinance and specifications require the contractor to employ only *bona fide* resident citizens of the city of New Orleans as laborers on the work, and it deprives the citizens of this State and of each and every State, and the inhabitants thereof of their privileges and immunities of citizens in the several States, secured to them by the Constitution of the United States, section 2, which provides, the citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States.

4. Because the city charter provides that the work shall be given to the lowest bidder, and the ordinance and specifications excludes the lowest bidder and do not admit of competitive bidders.

5. Because the ordinance imposes a liability on the property owner irrespective of the question whether or not his property is benefitted or damaged by the pavement.

Plaintiff, with leave of the court filed a supplemental and amended petition in which he averred that since the evidence in the case was closed the supreme court of the State, in a certain cause, entitled The Barber Asphalt Company *vs.* John Watt, No. 12927 of the docket of said court, had passed upon and decided the principal issues involved in the cause, and in said cause said court had decided that the property-owner's proportion of the cost of paving a street should be determined by ascertaining the entire cost of the work assessable to the property fronting thereon, and apportioning the same to said property in proportion to foot front-
77 age; that said decision had revealed to plaintiff that the city engineer's computation of the amount due by defendant was erroneous, that the cost of one block, instead of the entire work, was taken as the basis of apportionment according to foot frontage, the result being that the amount claimed in his original petition was in excess of the amount due by defendant under the law as construed by the supreme court as aforesaid. That plaintiff desired to amend his petition by reducing the amount of his claim to five hundred and ninety-five and $\frac{54}{100}$ dollars ($595.54); and he averred that the total cost of said paving work assessable to property for fronting thereon was ten thousand five hundred and nineteen $\frac{22}{100}$ dollars; the total frontage of the property thereon and subject to assessment therefor was 5,425.21 feet; and the amount chargeable per lineal foot to property fronting thereon was $1.938.95. That said last-named amount, multiplied by 307.2 feet, the frontage of defendant's property, produces five hundred and ninety five $\frac{54}{100}$ dollars, and which plaintiff now claims of defendant.

In view of the premises he prayed that "leave be given him to file this amended and supplemental petition; that defendant be duly cited to appear and answer the same; and that, after due proceedings had, he have judgment as prayed for in his original petition, except that the amount of said judgment be for the sum of five hundred and ninety-five and $\frac{54}{100}$ dollars, instead of six hundred and thirty-four and $\frac{80}{100}$ dollars; and he further prayed for general relief."

He subsequently filed with leave of the court, a second supplemental and amended petition in which he averred that he desired to correct a mistake in calculation made in his first supplemental and amended petition, wherein he stated that the total cost of said paving work assessable to the property fronting thereon, was ten thousand five hundred and nineteen $\frac{22}{100}$ dollars, the total frontage of property thereon, and subject to assessment thereof was 5,425.21 feet, and the amount chargeable per lineal foot to property fronting thereon was $1,938.95.

78 That he had since ascertained, and now averred that the foregoing figures did not include that portion of the work contracted for, and a necessary incident of the paving work, which consisted of curbing wings, etc., and the lumber used for such work adjacent to the sidewalks along the said street to be paved, that the

entire cost of said work was $1,893.75, or $0.34906 per lineal foot. That accordingly, the amount chargeable per lineal foot to property on said paving street was not $1.93895 but $1.93895 plus $0.34906, making the total due by defendant's property, having a frontage of 307.2 feet, the sum of $702.86, which was the true amount due plaintiff.

That plaintiff was willing, to avoid confusion, to waive the excess of what was due as aforesaid over the sum shown to be due by the certificate of the city engineer filed as exhibit of its original petition, in order that he might have judgment for the amount originally prayed for.

Defendant first excepted and under reservation of its exceptions answered these two petitions. It excepted to the same for the general reason that the matters therein contained and as in them stated, were insufficient in law for plaintiff to have and maintain the action and specially because the pretended ordinances of the city of New Orleans as recited in plaintiff's petition, and his alleged contract were illegal and unconstitutional, and therefore null and void for the reasons set forth in the answer and supplemental answers heretofore filed, which defendant reiterated in the same manner as if they were again specially set forth. That the city ordinances and specifications required the contractor to employ only *bona fide* resident citizens of the city of New Orleans as laborers on the work and was therefore contrary to the constitution of the State of Louisiana and to article IV, sec. 2 of the Constitution of the United States, and to the XIV amendment of the Constitution of the United States.

That the paving of the streets in front of his property had been of no benefit to it, on the contrary had damaged it, and the rendition of any judgment against him was taking his private property for public purposes and was contrary to the constitution of the State of La. (art. 167.) and contrary to the Constitution of the United States. (art. V.)

79 In his answer he pleaded the general issue and prayed for judgment and that all liens recorded and privileges recorded against his property to secure plaintiff's claim be cancelled.

Simultaneously with plaintiff's filing his amended petition the case was on his application, reopened for the purpose of allowing plaintiff to make the corrections mentioned in his supplemental petition.

New evidence was adduced including a new certificate signed by the city engineer and commissioner of public works, declared to have been issued in lieu of the first certificate and to apportion the cost in accordance with the decision of the Supreme Court in the case of The Barber Asphalt Paving Company *vs.* John Watt. It fixed seven hundred and two dollars and twenty-eight cents, as the proportion of the cost of construction for which plaintiff's property was liable.

The court rendered judgment in favor of the plaintiff against the defendant for the sum of six hundred and thirty-eight dollars and eighty cents, with six per cent. interest thereon from 24th September, 1896, and costs of suit with recognition of lien and privilege on

the property described in the certificate and on the proceeds thereof; and ordered the property to be sold and the proceeds applied to the payment of plaintiff's claim for the amount adjudged.

Defendant appealed.

Ordinance 11849 of the common council is as follows:

"MAYORALTY OF NEW ORLEANS,
"CITY HALL, *January 30th*, 1896.

"No. 11849, council series.

"An ordinance relative to the paving Hagan avenue, from Canal street to Esplanade avenue, with lake shells, under act 119 of 1886, as amended by act 142 of 1894.

"Whereas, the council did, by ordinance No. 11184, C. S. announce its intention to direct the pavement of Hagan avenue from Canal street to Esplanade avenue, with lake shells, under the provisions of act 119, of the Acts of 1886, as amended by act 142 of 1894, and to levy an assessment for three-quarters of the cost thereof, on the front proprietors on said street according to frontage; and, did, by said ordinance, direct the clerk of the council to publish
80 notice of said intention in the official journal, once a week for four weeks, and whereas, the said publication of notice of intention has been made in due form of law, and official notice thereof brought to this council.

"SECTION 1. Be it ordained by the common council of the city of New Orleans, two-thirds of all the members thereof concurring, That the city engineer is hereby instructed to immediately prepare plans and specifications for the paving of above-named streets with lake shells, and report the same to the council.

"SECTION 2. Be it further ordained, etc., That as soon as said plan and specifications are approved by this council, the comptroller is ordered and directed to advertise for ten days for bids of the paving of above-named streets with lake shells, according to said plans and specifications, and under the provisions of this ordinance, the council reserving the right to reject any or all bids.

"SECTION 3. Be it further ordained, That the cost of paving said street, as herein provided, and as established by the accepted bid shall be borne by the whole of the city of New Orleans, but that in accordance with the provisions of act No. 114 of the Acts of 1886, as amended by act 142 of 1894, there is hereby forced, imposed and levied on all the front proprietors of lots fronting on said street, three-fourths of the cost of said improvement and pavement, exclusive of the cost of intersections, said assessment to be levied on properties to the frontage of each property on said street, and to bear thereon as a first privilege, superior to the vendor's lien, and all other privileges and mortgages.

"SECTION IV. Be it further ordained, That as soon as said improvement and pavement is completed and accepted, square by square, the city engineer and commissioner of public works, be directed to measure or cause to be measured, the frontage of each front pro-

prietor on such completed and accepted squares, and to prepare and record in the mortgage office of the parish of Orleans, a certificate charging each front proprietor with three-fourths of the cost of the said improvement in front of his lot, which said certificate shall be made payable in favor of the contractor who should do said
81 work as hereinafter provided and which said certificates shall bear interest at the rate of six per cent. per annum from date until paid.

"SECTION 5. Be it further ordained, That no bid shall be received from any contractor for paving of said street as herein provided, unless he shall consent in his bid to receive the certificate, so ordered above to be prepared by the city engineer and commissioner of public works, for such proportion of the price, as said certificates shall bear to the cost of the whole work. In other words, while the city contracts with the contractor to do this work at the whole expense of the city, the said contractor is to consent to take in part payment of the price of said contract, the certificates of assessment hereby levied against the property-holders fronting on said street, to the amount and extent of said certificates. Similar certificates are to be prepared against the city for the cost of intersections and the other quarter of the pavement in front of private property, but the same are not to be recorded.

"SECTION 6. Be it further ordained, etc. That said certificates shall be due and demandable in favor of said contractor as soon as the same are issued as above provided, and any contractor to whom this contract is adjudicated is hereby specially subrogated to all rights, privileges, liens, claims, and demands of the city of New Orleans, in and into the local assessments herein made upon the properties fronting on said street, and in and to the certificates aforesaid, with full power and authority to sue on said certificates or on the said local assessment in his own name, or in the name of the city of New Orleans.

"Adopted by the council of the city of New Orleans, January 28th, 1896.

"DAN. A. ROSE,
"*Clerk of Council.*

"Approved January 30th, 1896.

"A true copy.

"JOHN FITZPATRICK, *Mayor.*

"CLARK STEEN,
"*Secretary to the Mayor.*"

82 *Opinion.*

Plaintiff, in his brief recognizes that under the law, "a contract signed by the mayor is *prima facie* proof of due observance of all antecedent forms and requirements of law." Referring to his claims that "no notice of intention to pave Hagan avenue from Canal to Esplanade street, was published in the official journal, once a week for four weeks, and that the pretended ordinance, was not passed by

a two-thirds vote, of the council," counsel declares they abandon the same.

There can be no question, and in fact it is conceded, that by acts No. 119 of 1886, and by that act as amended by act No. 142, of 1894 the council of the city of New Orleans was authorized "in its discretion to provide for the paving or banquetting of any street or portion thereof, at the expense of the whole city and to thereupon force, impose and collect of the front proprietors of lots fronting on said streets, a special assessment in proportion to frontage of three quarters of the cost of said improvement, "and that by said acts it was enacted that such local assessment should have a first privilege, superior to vendor's privilege and all other privileges and mortgages."

The constitutionality of those acts are not attacked directly, but the exercise by the city of authority, under the powers so granted, is called in question as being illegal, and unconstitutional.

Of the issues presented for decision by appellant, some are not properly before us for consideration on this appeal. He attacks the legality and constitutionality of the ordinance on the ground that, unless his property was benefitted by the work, he cannot legally be made to pay for the paving. It is not claimed that the paving of Hagan avenue, taken as a whole, was not a beneficial public improvement, nor, that as a whole, it was not a special local benefit to the owners generally of property fronting on the street. The mere fact that by carrying out such a public improvement, having in view the general good locally, and so resulting that some particular piece of property along the line of work might not be benefitted, would not justitiy the owner of that particular property, in preventing the execution of the work, nor warrant him in resisting the en-
83 forcement of the ordinance by which it was directed to be done, by pleading its unstitutionality. It certainly cannot be properly contended that the owner of a few feet of low or swamp land abutting on a public street, can hold in check a work of special local benefit and also general public benefit, by interposing as a constitutional bar, that his individual property would not be benefitted. If every individual citizen could raise such a separate issue and have the constitutionality or legality of the ordinance tested by or measured by the special effect of such ordinance on his own property, there would be no such thing as public progress. The special interest of a particular citizen would have to yield to the general good.

It is too late to question the right of the General Assembly to establish particular districts for the attainment of special local public good, through works of a particular character, and to order itself, or authorize some political body to order, special assessments to be made, within the district, for the purpose of meeting the cost and expenses of such works (George *vs.* Sheriff, 45th Annual, 1232). The work is done for the benefit of the local public; the assessment for its payment is levied upon the abutting lots, not because of any special benefit their owners derive from the improvement, but because this local public good demands it, and the law authorizes special taxation for such purpose. (See Morrison *vs.* Hershire, 32

Iowa, 271, 276.) It is true that in some instances, almost the whole benefit accrues to a few, but there can be no universal rule of justice, upon which such assessments can be made. An apportionment of the cost that would be just in one case, would be oppressive in another. For this reason, the power to determine when a special assessment shall be made, and on what basis it shall be apportioned *to* rests in the legislature or some political body to which it has delegated that authority.

Referring to the subject, Cooley in his work on taxation, page 429, says "The matter is wisely confided to the legislature and
84 could not, without the introduction of some new principle in representative government, be placed elsewhere. With the wisdom or unwisdom of special assessments when ordered in cases in which they are admissible, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion."

The subject of taxing districts says Cooley (page 449), "belongs to the legislature—so much is unquestionable. The authority may be exercised directly or in the case of local taxes, it may be left to local boards or bodies, but in the latter case, the determination will be by a body possessing for the purpose legislative power, and whose action must be as conclusive as if taken by the legislature itself. It has been repeatedly decided that the legislative act of assessing districts for special taxation on the basis of benefits, cannot be attacked on the ground of error of judgment regarding the special benefits, and defeated by satisfying a court that no special and peculiar benefits are received. If the legislature has fixed the district and laid the tax for the reasons, that in the opinion of the legislative body such district is peculiarly benefitted, that is conclusive," and so, when the legislature has adopted its method and standard of distributing the cost as constituting in its judgment as apportionment in proportion to the benefits as nearly as is reasonably practicable, the judiciary should not be called on to interfere." In many instances says Cooley, (p. 451): "Where streets are to be opened or improved, the benefits of which might be expected to diffuse themselves along the line of the improvement in a degree bearing some proportion to the frontage, the legislature has deemed it right and proper to take the line of frontage as the most practicable and reasonable method of possible benefits, and making that the standard to apportion the benefits accordingly. Such a method of apportionment seems at first blush to be perfectly arbitrary and likely to operate in some cases, with great injustice; but it cannot be denied that in the case of some improvements, frontage is a very reasonable measure of benefits; much more than value can be, and, perhaps, approaching equally as nearly as any estimate of benefits made by the judgment of men. However this may be, the authorities
85 are well united in the conclusion that frontage may be lawfully made the basis of apportionment. Occasional hardships must inevitably result from the adoption of such a basis but the question is fairly debatable, whether they are likely to be more

serious or more frequent than those which are to be anticipated from the selection of some other rule."

Appellant relies very greatly upon the decision of the Supreme Court of the United States in "Village of Norwood *vs.* Baker, (172 U. S. 269) but that case was decided upon an entirely different state of facts. Appellant's property is not sought to be taken from him by the city in the exercise of the power of eminent domain. The city has simply exercised its unquestionable right and power of paving an existing public street in the interest of the special local public benefit, and demanded of owners of property abutting and fronting on the street, that they contribute to the cost of the improvement in a manner and form, and to an extent fixed by the General Assembly. The object of the paving of the street was to benefit parties owning property upon it by the improvement of the access to their properties. It is not pretended that this particular purpose was not accomplished even as to appellant's property. It cannot be exacted for the purpose of sustaining the constitutionality of a statute or ordinance authorizing a work of local public improvement, at the cost of abutting owners that it be shown there is benefit in every possible respect to the particular owners, nor that the benefit be direct and immediate. (Lent *vs.* Tillson, 72 Cal. 428, 14 Pac. 71. George *vs.* Sheriff, 45th Ann. 1232.)

This whole subject has been recently examined in Hadley *vs.* Dague, 62 Pac. 505, and the case of the "Village of Norwood *vs.* Baker," referred to and discussed.

The General Assembly has in act No. 119 of 1886, conferred upon the common council the right and power by a two-thirds vote to constitute any particular street which it proposes to pave, a special taxing district for the purpose of meeting the cost of making such paving. It has exercised this right and power in the matter of the paving of Hagan avenue. Having done so, the legislature itself has designated how, in what proportion, and by what standard
86 this cost is to be met. The council was not at liberty to depart from this apportionment. The judiciary is not authorized to alter it and to substitute for a fixed legislative standard, a fluctuating judicial standard based upon actual benefits received and measured by values or enhanced values to be established by evidence and proof.

Appellant claims that "if the ordinance has provided an illegal method of computing the cost to the property-owner, the council cannot change it and institute another way, to enable the contractor to collect. The ordinance is null and void. He can have no cause of action."

We have held in Barber Asphalt Paving Company *vs.* John Watt, 51 Ann. 1145, and Moody and Company *vs.* Chadwick, 52nd Annual, 1888, that where the property-owner or his property is sought to be made liable for a proportion of cost other than that fixed by law, he is entitled to protection, but where he is sought to be charged only to the extent which the law directs him to be charged, he has no ground of complaint.

The parties to the contract in this case were the city of New

Orleans and A. J. Christopher. The work done, has, as between the contracting parties been accepted, as having been executed to the city's satisfaction entitling the contractor to payment. If, from any unavoidable cause the work has not been extended out as far as it was contemplated it should be, the property-owners cannot complain unless a proper reduction of cost has not been made and their contributing shares been correspondingly brought down, or that the object had in view by the improvement had suffered from the fact. There is no claim of this kind alleged or shown. In Cooley on Taxation, p. 468, it is said: "It is no defense to an assessment that the contract for the work was not performed according to its terms. The proper authorities must decide upon this and if they accept the work, the acceptance in the absence of fraud is conclusive. And even fraud it would seem, could not be accepted as a defense to the assessment but must be determined in some direct proceeding instituted for the purpose." It was decided in Nolan *vs.* Peese, 32nd Cal. 484, that fraud in letting the contract was no defense to the assessment. It might doubtless be a reason for enjoining the execution of a contract on a bill filed in due season.

87 Appellant overlooks the fact that the basis of contribution as between the city and the property-owners affects the question of payment under the contract, not the contract itself.

The contractor cannot receive any greater payment from the property-owners under the certificates than the law authorizes the property-owners or their property to be charged with, but the fact that more was sought of them than the law authorizes, does not cause him to forfeit what he is really entitled to. If the proportion of contribution was made on a wrong basis the abutting owners had the right simply to insist that the proper basis be adopted and the legal proportion be established on that basis. The judgment, as it reads, decrees a general personal judgment against the defendant in favor of the plaintiff to its fullest extent.

We do not understand that such was the intention of the court below. It doubtless adopted the phraseology it used as a convenient method of describing the extent of plaintiff's rights, assuming that the extent — which the judgment could be executed would be controlled by the application to it of the legal principles, governing claims of this particular character. In affirming the judgment appealed from we think it proper to say that as to scope and in its enforcement it must be governed by the principles announced in the case of the Barber Asphalt Paving Company *vs.* John Watt, reported in 51st Annual, 1888.

And so construed, the judgment appealed from is affirmed.

Judgment of the Court.

(Extract from the Minutes.)

NEW ORLEANS, MONDAY, *February 4th*, 1901.

The court was duly opened, pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice, Joseph A

Breaux, Newton C. Blanchard, Frank A. Monroe, associate justices. Absent: Lynn B. Watkins, associate justice.

His honor, the chief justice, pronounced the opinion and judgment of the court in the following case:

88 JOHN M. KELLY
vs.
EDMOND H. CHADWICK. } No. 13505.

Appeal from the civil district court for the parish of Orleans.

In affirming the judgment appealed from we think it proper to say that as to scope and in its enforcement it must be governed by the principals announced in the case of The Barber Asphalt Paving Company *vs.* John Watt, reported in 51st annual, 1888.

And so construed, the judgment appealed from is affirmed.

Petition for Rehearing.

JOHN M. KELLY
vs.
E. H. CHADWICK. } No. 13505.

To the hon. the supreme court of Louisiana:

The defendant and appellant, E. H. Chadwick, prays for a rehearing and for cause shows:—

1. The court erred in deciding that although defendant's property was not benefited by the paving, he can be made to pay for the paving; and that he could not plead in his defense, that under article 167 of the State constitution of 1898, and article 152 of the State constitution of 1879, and article V of the Constitution of the United States, which provides, that private property shall not be taken for public use without just compensation, and article XIV, amendment, of the Constitution of the United States, which provides that no State shall deprive any person of property without due process of law; that his property was being taken for public purposes without compensation; that he could be made to pay for the paving, although his property was not benefited by the paving; that individual property could be taken, and individuals be made to pay for paving in front of their properties, although the pavement may be of no benefit to them.

89 2. The court erred in deciding that the legislature of the State can order itself, or authorize some political body to order special assessments to be made, within the district for the purpose of meeting the cost and expenses of such works, at the expense of the property-owner, when no special benefit is derived therefrom by the property-owner from the improvement. And that the power to determine when a special assessment shall be made, and on what basis it shall be apportioned is vested in the legislature, and that the property-owner can be made to pay therefor, *irrespective* of the question whether or not his property is benefited by the paving or improvement: that when the legislature had adopted the method

and standard of distributing the cost, the judiciary should not interfere, although the property-owner was not benefited by the paving or improvement.

3. The court failed to state that the evidence showed and the fact is that the property of the defendant was not only not benefited, but was actually damaged by the pavement.

4. The court erred in not finding that the act No. 119 of 1886 of the legislature of the State of Louisiana, which imposed upon the common council the right and power by a two-thirds vote to pave, and make the property-owner pay therefor unconditionally whether benefited or not, violates the Constitution of the United States, especially article V of the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation, and article 167 of the constitution of 1898 of Louisiana, and article 162 of the constitution of Louisiana of 1879, and violates article XIV, amendment, Constitution of the United States, which provides that no State shall deprive any person of property without due process of law.

5th. The court erred in deciding that the question whether or not the property-owned was benefited by the paving or improvement was not a question of evidence, a fact to be determined by a court. And in deciding that the common council, by ordinance, having ordered the paving or improvement, conclusively determined the question of improvement.

6. The court erred in not finding that inasmuch as the municipal ordinance, provided an illegal method of computing the cost to the property-owner, and the bid of the contractor and the con-
90 tract made with him by the city were illegal, contrary to the statute of the State, the contractor cannot recover from the property-owner.

7. The court erred in deciding that the contractor can make the defendant pay, although he, the contractor, had not completed the entire work of paving.

8. The court erred in deciding that the contractor can recover under any other basis than his contract, and that he can substitute a legal basis for an illegal one provided in his contract.

9. The court erred in not reversing the judgment of the lower court; if the court means to decide that no personal judgment can be rendered against defendant; that no personal judgment could be rendered against defendant was decided in Barber Asphalt Company *vs.* Watt, — An. and in Moody *vs.* Chadwick, — An.

The judgment in this case was personal against the defendant, and the supposition of this court how it will be executed is not warranted by any cause or reason. If the court supposed that the judgment reads personal against defendant, but will be executed as a judgment *in rem*, why did the court reverse Moody *vs.* Chadwick?

10. The court failed to consider and decide, whether the plaintiff, the contractor, can sue the defendant without a subrogation; the question is made and argued in our brief, and should be met as made.

11. Whether the recital by a notary in a contract of what a city

ordinance is, is admissable evidence of the ordinance. See Bill of Exceptions, p. 5, and Briefs, p. 11.

If the court should find that plaintiff should have been permitted to file the ordinance to the rejection to which he excepted, p. 16, then the case stands with the ordinance only, and without specifications with a portion of the ordinance only, for the specifications make a part of the ordinance.

The court failed to consider and decide whether an ordinance which provides that "bidders to be eligible must have paid their city license" is legal. The question was made and argued. Brief, p. 14.

12. The defendant in pleadings and brief contended that the ordinance was illegal, because it provided that none but *bona fide*
91 resident citizens of New Orleans shall be employed as laborers to work, and that it violates the constitution of this State and of the United States, article IV, sec. 2, and amendment XIV, sec. 1. The question was made in the pleadings and argued in the brief, p. 4.

Of course the judgment of this hon. court could not have been rendered without finding that the law and the ordinance, which we say violated the Constitution of the United States, do not violate it and are not repugnant to the Constitution of the United States, but the same questions of constitutional law are here presented, have received the serious consideration and determination of the highest courts in the country, and we feel we would like to have the opinion of this court in our favor.

Respectfully submitted.

(Signed) GEO. L. BRIGHT,
EDWIN N. WHITTEMORE,
Counsel for Petitioner.

(Endorsed:) No. 13505. Supreme court of Louisiana. John M. Kelly *vs.* Edmund H. Chadwick. Petition for rehearing. Filed February 8th, 1901. (Signed) Paul E. Mortimer, dep. clerk.

Rehearing Refused.

(Extract from the Minutes.)

NEW ORLEANS, MONDAY, *February 18th*, 1901.

The court was duly opened pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, associate justices. Absent: Lynn B. Watkins, associate justice.

JOHN M. KELLY
vs. } No. 13505.
EDMOND H. CHADWICK.

By the COURT:

It is ordered that the rehearing applied for in this case be refused.

92 *Petition for Writ of Error.*

Petition to the supreme court of the State of Louisiana for a writ of error.

Supreme Court of Louisiana.

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 13505.

To the honorable the supreme court of the State of Louisiana:

The petition of Edmund H. Chadwick a citizen of the United States, and of the State of Louisiana, the defendant in the above entitled and numbered cause, respectively shows:

That in the above entitled and numbered cause, there was drawn in question, the validity of act No. 73 of 1876 of the General Assembly of the State of Louisiana and of act No. 20 of 1882, specially section 37 of said act; and act 119 of 1886, and act No. 142 of 1894, and the validity of the ordinances of the city of New Orleans, Nos. 11184, 11849 and 12136, under the authority of which plaintiff claims and seeks to recover from defendant the cost and expense of improving and paving Hagan avenue from Canal street to Esplanade street, and in front of your petitioner's property, as being repugnant to the Constitution of the United States, particularly to artice V which provides "that no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation," and amendment to article XIV section 1 which provides: "All persons born or naturalized in the United States subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, " on the grounds, and for the reason, that the said acts of the General Assembly of
93 Louisiana, and the ordinances of the city of New Orleans, enacted in pursuance thereof, deprived your petitioner of his private property, and took it for public use, without just compensation, and abridged the privileges and immunities of citizens of the United States, and deprived them of their property without due process of law, and denied to persons within its jurisdiction the equal protection of the laws to the injury of your petitioner.

That on 4th February 1901 this court rendered a judgment herein in favor of plaintiff and against defendant notwithstanding its pleas and defenses that the said acts of the legislature of Louisiana, and the said ordinances of the city of New Orleans were violative or in contravention of the Constitution of the United States, and decided that said acts of the General Assembly of Louisiana and said ordi-

nances of the city of New Orleans were valid; that thereupon defendant applied for a rehearing, and the rehearing was refused on the 18th February 1901 and the original judgment of the court rendered on 4th February 1901 became final on the 18th February 1901.

That in said decision, final judgment, and decree, and the proceedings had in this court prior thereto certain errors were committed to the prejudice of defendants all of which will more in detail appear in the assignment of errors filed with this petition.

That petitioner desires, by writ of error to remove this cause to the Supreme Court of the United States, there to be reviewed and the correctness of said decision, final judgment or decree and the proceedings prior thereto be determined.

Wherefore petitioner prays: that a writ of error to operate as a supercedeas may issue on his behalf to the Supreme Court of the United States for the correction of errors so contained—that the court fix the amount of bond to be given to act as a supercedeas—that a transcript of the record of the proceedings and papers in this case, duly authenticated may be sent to the Supreme Court of the United States returnable thereto, within thirty days from the granting of this prayer; that the plaintiff John M. Kelly be cited to answer thereto; and he prays for general relief.

(Signed) GEO. L. BRIGHT,
94 EDWIN N. WHITTEMORE.
Counsel for Petitioner.

Order.

Let a writ of error be granted unto petitioner Edmund H. Chadwick, defendant, to operate as a supersedeas to the Supreme Court of the United States upon petitioner giving bond according to law in the sum of fifteen hundred dollars—let a transcript of the record of the proceedings and papers in this case duly authenticated be sent to the Supreme Court of the United States, returnable thereto within thirty days from the granting of this order—let the plaintiff John M. Kelly be cited to answer thereto, all as prayed for.

New Orleans February 1901.

Allowed.

(Signed) FRANCIS T. NICHOLLS.
Chief Justice Supreme Court of Louisiana.

(Endorsed:) No. 13505. Petition for writ of error. John M. Kelly *vs.* E. H. Chadwick. Filed February 21st, 1901. (Signed) T. McC. Hyman, clerk.

Assignment of Errors.

Supreme Court of Louisiana.

JOHN M. KELLY
vs.
EDMUND H. CHADWICK. } No. 13505.

The defendant in this cause in connection with his petition for a writ of error makes the following assignment of errors, which he avers are contained in the decision, judgment or decree of the supreme court of the State of Louisiana.

First. That the said court erred in holding that the statutes of the General Assembly of the State of Louisiana, known as act No. 73 of 1876 and act No. 20 of 1882 specially section 37 thereof; and
95 act No. 119 of 1886 and act No. 142 of 1894, and the ordinances of the city of New Orleans known as Nos. 11184, 11849 and 12136, under the authority of which plaintiff claims and seeks to recover are not violative of the Constitution of the United States particularly of article V and article XIV section 1 of the amendments thereto, and that the pleas and defenses urged by defendant of these articles of the constitution are not complete and perfect defenses against the claim of the plaintiff.

Second. The court erred in deciding that the question whether or not the property owned was benefited by the paving or improvement was not a question of evidence, a fact to be determined by the court, and in deciding that the common council by ordinance, having ordered the paving or improvement, conclusively determined the question of improvement and benefit, and the court erred in not finding that the defendant could not be made to pay the cost of the pavement whether he was benefited or not to the extent of such cost; in not finding that the statutes of the State and the ordinances of the city of New Orleans were illegal and violative of the Constitution of the United States because they excluded the consideration of benefits.

Third. The court erred in not finding that inasmuch as the municipal ordinance provided an illegal method of computing the cost to the property owner, and the bid of the contractor and the contract made with him by the city were illegal, contrary to the statute of the State, the contractor cannot recover from the property-owner.

Fourth. The court erred in deciding that the contractor can make the defendant pay, although he the contractor, had not completed the entire work of paving.

Fifth. The court erred in deciding that the contractor can recover under any other basis than his contract and that he can sub-
96 stitute a legal basis for an illegal one provided in his contract.

Sixth. The court, by its own reasoning, erred in affirming the judgment of the district court.

Seventh. The court erred in not finding and so stating that the

property of defendant, was not benefited but was damaged by the paving.

Eighth. The court erred in not finding that the plaintiff has no right of action because he has no subrogation from the city of New Orleans.

Ninth. The court erred in not considering and deciding the question whether the statement made by the notary public of the existence and contents of a city ordinance is evidence of the ordinance. The question is presented by a bill of exception in the transcript, and is argued in the brief.

Tenth. The court erred in not finding that the ordinance which provides "bidders to be eligible must have paid their city license" is invalid.

Wherefore this defendant and petitioner, plaintiff in error, prays that the judgment of the said supreme court of Louisiana be reversed and such directions be given; that full force and efficacy may inure to the defendant by reason of the defenses pleaded by it, in the said cause.

(Signed) GEO. L. BRIGHT,
EDWIN N. WHITTEMORE,
Counsel for Defendant.

(Endorsed:) No. 13505 John M. Kelly *vs.* E. H. Chadwick. Assignment of errors. Filed Febr'y 21, 1901 (Signed) T. McC. Hyman, clerk.

97 *Copy of Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court in which John M. Kelley is plaintiff and Edmund H. Chadwick is defendant before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the said above-named parties wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Edmund H. Chadwick as by his complaint appears. We being willing that error, if any hath been,

should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws
98 and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 21 day of February, in the year of our Lord one thousand nine hundred and one.

(Signed) E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

(Signed) H. J. CARTER,
Deputy Clerk.

Allowed by
(Signed) FRANCIS T. NICHOLLS,
Chief Justice.

(Endorsed:) Supreme court of La. No. 13505. John M. Kelley *versus* (writ of error) Edmund H. Chadwick. Copy of writ of error lodged in the clerk's office of the supreme court of Louisiana in pursuance of the statute in such cases made and provided, this 21st day of February one thousand nine hundred and one. Geo. L. Bright attorney of plaintiff in error. Filed February 21, 1901. (Signed) T. McC. Hyman clerk.

Bond for Writ of Error.

Know all men by these presents, that we Edmund H. Chadwick as principal and Miss Frances A. Chadwick as surety are held and firmly bound unto John M. Kelly in the full and just sum of fifteen hundred $1,500 dollars to be paid to the said John M. Kelley his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 20th day of February, in the year of our Lord one thousand nine hundred and one 1901.

Whereas, lately at a supreme court of the State of Louisiana in a suit depending in said court, wherein John M. Kelly is plaintiff and Edmund H. Chadwick — judgment was rendered against
99 Edmund H. Chadwick defendant and the said Edmund H. Chadwick having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John M. Kelly citing — admonishing him to be and appear at the Supreme

Court of the United States to be holden at Washington within thirty days from the date thereof.

Now the condition of the above obligation is such, that if the said Edmund H. Chadwick shall prosecute said writ to effect, and answer all damages and cost if he fail to make his plea good then the above obligation to be void else to remain in full force and virtue.

(Signed) E. H. CHADWICK. [L. S.]
Do. FRANCIS A. CHADWICK. [L. S.]
—— ——. [L. S.]

Sealed and delivered in the presence of—
—— ——.

Approved by—to operate — a supersedeas.
(Signed) FRANCIS T. NICHOLLS,
Chief Justice.

UNITED STATES OF AMERICA, }
Eastern District of Louisiana, } *ss:*

Personally appeared Miss Francis A. Chadwick who being duly sworn deposes and says that she is the surety on the within bond, that she resides in New Orleans La. and is worth the full sum of fifteen hundred dollars, over and above all her debts and liabilities and property exempt from execution.

(Signed) FRANCES A. CHADWICK.

Subscribed and sworn — before me this 20th day of February, 1901.

[SEAL.] (Signed) JOHN J. WARD,
Not. Pub., Commissioner U. S. Circuit Court,
Eastern District of Louisiana.

(Endorsed:) No. 13505. John M. Kelley *vs.* E. H. Chadwick. Bond for writ of error filed February 21st, 1901. (Signed) T. McC. Hyman, clerk.

100 UNITED STATES OF AMERICA, }
State of Louisiana. }

Supreme Court of the State of Louisiana.

I, Thomas McCabe Hyman, clerk of the supreme court of the State of Louisiana, do hereby certify that the foregoing ninety-nine pages contain a full, true, and complete copy of the transcript of the proceedings had in the civil district court for the parish of Orleans in a certain suit wherein John M. Kelly was plaintiff and Edmund H. Chadwick was defendant; and also of all the proceedings had in this supreme court on the appeal taken by said defendant, which appeal is now on the files thereof under number 13505.

In testimony whereof I have hereunto set my hand and affixed

Seal of the Supreme Court of the State of Louisiana.

the seal of said court, at the city of New Orleans, this eleventh day of March, anno Domini, one thousand nine hundred and one, and in the one hundred and twenty-fifth year of the Independence of the United States of America.

T. McC. HYMAN, *Clerk.*

Certificate of the Chief Justice.

UNITED STATES OF AMERICA, }
State of Louisiana. }

Supreme Court of the State of Louisiana.

I, Francis Tillou Nicholls, chief justice of the supreme court of the State of Louisiana, do hereby certify that Thomas McCabe Hyman is clerk of the supreme court of the State of Louisiana; that the signature of Thomas McCabe Hyman to the foregoing certificate is in the proper handwriting of him the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

101 In faith whereof I have hereunto set my hand and seal, at the city of New Orleans, this eleventh day of March, in the year of our Lord, one thousand — and one, and in the one hundred and twenty-fifth year of the Independence of the United States of America.

Seal of the Supreme Court of the State of Louisiana.

FRANCIS T. NICHOLLS,
Chief Justice.

102 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, in which John M. Kelley is plaintiff and Edmund H. Chadwick is defendant, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the said above-named parties wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the

103 Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed

under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Edmund H. Chadwick as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 21st day of February, in the year of our Lord one thousand nine hundred and one.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana,
By H. J. CARTER,
Deputy Clerk.

Allowed by—
FRANCIS T. NICHOLLS,
Chief Justice.

[Endorsed:] Supreme Court of La. No. 13505 John M. Kelley *versus* Edmund H. Chadwick Writ of error. Filed Feb'y 21, 1901 T. McC. Hyman clerk.

104 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to John M. Kelley, New Orleans, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, within 30 days from date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein Edmund H. Chadwick is plaintiff in error and John M. Kelly residing in the city of New Orleans State of Louisiana is defendant in error, to show cause, if any there be, why the judgment rendered against the said Edmund H. Chadwick, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 21 day of February in the year of our Lord one thousand nine hundred and one.

[Seal Supreme Court of the State of Louisiana.]

FRANCIS T. NICHOLLS,
Judge, Chief Justice.

105 [Endorsed:] Personal, 321 Carondelet. In person, 26 '01 Goss Supreme court of Louisiana *Supreme court of Louisiana* No. 13505 John M. Kelley *vs.* Edmund H. Chadwick. Citation. Received Saturday Feb. 23 1901 and on — No. 13505. Supreme court of Louisiana Filed February 27th 1901. Paul E. Mortimer, dept. clerk.

Marshal's Return.

Received Saturday Feb. 23 1901 and on—*received Feb. 23d* 1901 *and on* the 26th day of Feb'y, 1901 I served a copy of the within citation on John M. Kelley defendant in error herein by personal service on said John M. Kelley.
Returned same day.

C. M. GOSS,
D'y Civil Sheriff, Parish of Orleans, State of Louisiana.

Christian M. Goss being duly sworn deposeth and says that he made a personal service of a copy of the within citation on John M. Kelley at the date above mentioned.

C. M. GOSS.

Sworn to and subscribed before me at city of New Orleans this twenty-seventh day of February, A. D. 1901.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Deputy Clerk, Supreme Court of Louisiana.

Endorsed on cover: File No. 18,085. Louisiana supreme court. Term No. 275. Edmund H. Chadwick, plaintiff in error, *vs.* John M. Kelley. Filed March 20, 1901.

8220

No. 275. 63

Brf. of Bright for P. & E.

Office Supreme Court U.S.
FILED
MAR 25 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

No. 275.

Filed Mar. 25, 1902.

EDMUND H. CHADWICK, PLAINTIFF IN ERROR.

versus

JOHN M. KELLEY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Brief for the Plaintiff in Error.

GEO. L. BRIGHT,
Counsel for E. H. Chadwick, Plaintiff in Error.

The L. Graham Co., Ltd., New Orleans.

Supreme Court of the United States.

No. 275.

EDMUND H. CHADWICK, PLAINTIFF IN ERROR.

versus

JOHN M. KELLEY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Brief for the Plaintiff in Error.

SYLLABUS.

An ordinance of the Council of the City of New Orleans which provides that in all contracts let by the City of New Orleans for public works, of every kind and nature, the contractor shall not employ any other but *bona fide* resident citizens of the City of New Orleans as laborers on such public work, is violative of the XIV Amendment of the Constitution of the United States.

The statute of Louisiana and the ordinances of the City

of New Orleans which condemn a property owner to pay for the paving of a street in front of his property irrespective as to whether he is benefited or not by the paving—when he is not benefited by paving, but seriously damaged thereby—which imposes on him a personal liability largely exceeding the value of the property it violates the Constitution of the United States, Article V.

STATEMENT.

John M. Kelley is the transferee of A. J. Christopher. He alleges in his petition that Christopher made a contract with the City of New Orleans, the City being authorized to contract by ordinance 12,136, to pave Hagan avenue from Canal to Esplanade street; that the paving was done in accordance with Section 37 of Act No. 20 of 1882, of Louisiana, entitled an act to incorporate the City of New Orleans, amended by Act No. 119 of 1886, amended by Act No. 142 of 1894—and was done by virtue of Ordinances Nos. 11,184, 11,849, 12,136 and other laws and ordinances on the same subject matter and in force at the time. He alleges that Edmund H. Chadwick was the front proprietor of 307 ft. 2 in. lineal feet, on Hagan avenue, being the whole square of ground, and is consequently *personally* liable to him for three-fourths of the contract price of paving in front of his property. He prays for a personal judgment against Chadwick for $638.80 with recognition of a lien and privilege on the whole square of ground. R., pp. 1, 2, 3.

Chadwick answered, p. 9, but as this answer does not present the issue for the writ of error, we need not recite it.

Chadwick subsequently filed an amended and supplemental answer, R., p. 35, and we recite only such parts of the answer as will be considered under the writ of error. He alleged that the ordinance is unconstitutional and illegal, because the ordinance and specifications require the contractor *to employ only bona fide resident citizens of the city of New Orleans as laborers on the work*, and deprives the citizens of this State (Louisiana) and of each and every State, and the inhabitants thereof, of their privileges and immunities of citizens in the several States, secured to them by the Constitution of the United States, Article IV, Sec. 2, which provides the citizens of each State, shall be entitled to all privileges and immunities of the citizens of the several States. R., p. 35.

The plaintiff Kelley filed a supplemental petition, p. 36, which we need not recite for the purpose of the present writ of error. He filed another supplemental petition, p. 39, which we need not recite for the present writ of error.

Whereupon the defendant Chadwick filed an answer with a view of obtaining a writ of error to this Court, should the State court decide against him, p. 40.

First. He alleged that the ordinances of the City of New Orleans are illegal and unconstitutional because they require the contractor to employ only *bona fide* resident citizens of the City of New Orleans as laborers on the work and is therefore contrary to the Constitution of the State of Louisiana and to *Article IV, Sec. 2 of the Constitution of the United States* which provides *Section 2. The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States and to the XIV amendment of the Constitution of the United States which provides Article XIV, Sec. 1: All persons, born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of*

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. R., p. 40.

Second. And the defendant alleged that the paving of the street in front of his property has been of no benefit to it, on the contrary has damaged it, and the rendition of a judgment against him is taking his private property for public purposes and is contrary to the Constitution of the United States, Article V, which provides that no person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The cause was tried before the State District Court and the court rendered a personal judgment against the defendant Chadwick for the amount claimed "$638.80 with 6 per cent interest thereon from September 24, 1896, until paid and all costs of suit; the whole with recognition of plaintiff's lien and privilege for the payment thereof, on the following described property: five certain lots of ground situated in this city in the square bounded by Hagan avenue, Toulouse, Rendon streets and Carondelet walk and Hagan avenue, with a depth and front on Carondelet walk of 31 feet and a depth and front on Hagan avenue of 100 feet between parallel lines. Lots 2, 3 and 4 adjoining lot No. 1 and having a frontage respectively of 35 feet 8 inches and 6 lines, 35 feet 8 inches 7 lines and 35 feet 8 inches 7 lines, or a combined frontage of 107 feet 2 inches on Hagan avenue and each with a width of 154 feet 8 inches between parallel lines, and lot No. 5, adjoining said lots last described and having a frontage and depth on Hagan

avenue of 100 feet and a front on Toulouse street, of which it forms a corner of 31 feet between parallel lines and on the proceeds thereof, the said property to be sold and the proceeds applied to the payment of the plaintiff's claim as here adjudged." R., pp. 49, 50.

A sketch of these lots is on page 13, R.

From this judgment the defendant appealed to the Supreme Court of the State of Louisiana, p. 50. The Supreme Court affirmed the judgment, p. 57-66.

A writ of error issued to the Supreme Court of Louisiana returnable to this Court, p. 70-71.

The errors assigned R. p. 72 are:

First. That the Court erred in holding that the statutes of the General Assembly of the State of Louisiana, known as Act No. 73 of 1876, and Act No. 20 of 1882 specially Section 37 thereof and Act No. 119 of 1886 and Act No. 142 of 1894 and the ordinances of the City of New Orleans known as Nos. 11,184, 11,849, and 12,136, under the authority of which plaintiff claims and seeks to recover are not violative of the Constitution of the United States, particularly of Article V, and Article XIV Section 1 of the amendments thereof, and that the pleas and defenses urged by defendant of these Articles of the Constitution are not complete and perfect defenses against the claim of the plaintiff.

Second. The Court erred in deciding that the question whether or not the property owned was benefited by the paving or improvement was not a question of evidence, a fact to be determined by the Court, and erred in deciding that the common council by ordinance, having ordered the paving or improvement, conclusively determined the question of improvement and benefit, and the Court erred in not finding that the defendant could not be made to pay the cost of the pavement, whether he was benefited or not to the extent of such cost—in not finding that the statutes of the State

and the ordinances of the City of New Orleans were illegal and violative of the Constitution of the United States because they excluded the consideration of benefit. R., p. 72.

BRIEF AND AUTHORITIES.

First. The ordinance and the contract made in pursuance thereof require the contractor to employ only *bona fide* resident citizens of the City of New Orleans as laborers on the work and is contrary to the Constitution of the United States, Article IV, Sec. 2 of the Constitution of the United States which provides: Section 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. The XIV amendment of the Constitution of the United States provides: Article XIV, Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The ordinance is:

Mayoralty of New Orléans,
City Hall, March 26, 1895.

NO. 10,486, COUNCIL SERIES.

AN ORDINANCE relative to the employment of resident labor by public contractors:

SECTION 1. BE IT ORDAINED by the Common Council of the City of New Orleans, That hereafter in

all contracts let by the City of New Orleans, for public works, of every kind and nature, there shall be written into the said contracts, as one of the conditions and specifications thereof, that no public contractor on any public work within the City of New Orleans, who has obtained such contract from the City of New Orleans, shall employ any other but *bona fide* resident citizens of the City of New Orleans as laborers on such public work, under his contract.

SEC. 2. Be it further ordained, etc., That it shall also be considered a condition of each and every public contractor mentioned in Section 1, that the contractor shall pay as liquidated damages, for each and every person employed in violation of the provisions of Section 1, a penalty of Twenty-five Dollars ($25.00) to be recovered before any court of competent jurisdiction, for the benefit of the Charity Hospital, and that either the City of New Orleans, or the Board of Administrators of the Charity Hospital shall have authority to sue for and recover these penalties.

SEC. 3. Be it further ordained, etc., That the bond to be given by the contractor, as security for the execution of said contracts, shall be held and deemed to cover liability on the part of the surety for all of the penalties incurred by the contractor in violation of these conditions of his contract.

SEC. 4. Be it further ordained, etc., That all public officials charged with the preparation of specifications of contracts for public work are directed to write the above conditions in all such specifications, and the City Notary is specially charged with the duty of seeing that the conditions in said Sections 1, 2 and 3 of this ordinance shall be written into and made part of every notarial contract for any public work let out by the City of New Orleans.

Adopted by the Council of the City of New Orleans, March 19th, 1895.

DAN A. ROSE,
Clerk of Council.

Approved March 26, 1895.

JOHN FITZPATRICK,
Mayor.

A true copy:

CLARK STEEN,
Secretary to the Mayor.

The contract R., p. 4, which is made a part of the petition, R., p. 2, states, the ordinance provided as follows:

"It is agreed and understood that the provisions and requirements of Ordinance No. 10,486 Council series, are made part of the specifications of this contract and accordingly said contractor and assigns *is and are hereby bound and obligated to employ only bona fide resident citizens of the City of New Orleans as laborers on the work provided for in this contract.*"

The contract R., p. 8, says:

"Now the condition of the foregoing bond or obligation is such that if the said A. J. Christopher, contractor, shall well, truly and faithfully do and perform all and singular the requirements, the requirements of the foregoing contract strictly in accordance with the specifications and to the satisfaction of the City Council of the City of New Orleans, then the above-written bond or obligation shall be null and void, and of no effect, but otherwise to be and remain in full force and virtue." R., p. 8.

1. Constitution United States IV, Sec. 2 reads: "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States."

Amendment, Art. XIV, Sec. 1: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The ordinance deprives every person not a *bona fide* resident citizen of the City of New Orleans the right to labor on the contemplated improvements; it deprives him of the right to labor and live—none but resident citizens of the City of New Orleans who are qualified voters and therefore electors of ward politicians to office in New Orleans have any right to work for a living. A citizen of another State is excluded—so are foreign born persons not naturalized.

That such an ordinance is illegal and violative of the Constitution of the State and especially of the United States has been frequently decided.

The protection extends to foreign-born unnaturalized citizens. Jaunita Limestone Co. vs. Fagley, 40 A. 977; 187 Pa. St. 193; 42 Weekly Notes of Cases 537; 42 Lawyers' Reports Annotated 142; Barbier vs. Connelly, 113 U. S. 27; Vick Wo vs. Hopkins, 118 U. S. 356; Fraser vs. McConway & T. Co., 6 Pa. Dist., p. 353.

In *Blake vs. McClung*, 20 S. Ct. 307, 176 U. S. 59, it was decided, giving priority to creditors residing in the State over those who reside out of the State, in distributing the assets of an insolvent corporation is a violation of Constitution of United States, Art. 4, providing for equal privileges and immunities of citizens in the several States.

In *Fiske vs. People ex rel. Raymond*, (Ill.) 52 L. R. A. 287 Ordinances requiring union labor only on city

contracts, and that laborers shall not work more than 8 hours per day are held unconstitutional.

In *Juanita Limestone Co. vs. Fagley*, 40 A. 977; 187 Pa. St. 193; 42 Weekly Notes of cases 537; 42 Lawyers' Rep. Annotated 442, it was decided, Act June 15, 1897, regulating the employment of foreign-born persons, contravenes the 14th Amendment of the federal constitution, declaring that no State shall deny to any person within its jurisdiction the equal protection of its laws. The act provided that all persons employing foreign-born citizens, unnaturalized male persons over 21 years of age within this commonwealth shall be and are hereby taxed at the rate of 3 cents per day for each person so employed; and further provided, that the tax might be deducted from the wages of the employee.

July 21, 1898, The Supreme Court of Pennsylvania decided that this statute offends against the 14th Amendment of the Constitution of the United States. See also Barbier vs. Connelly, 113 U. S. 27; Vick Wo vs. Hopkins, 118 U. S. 356; Fraser vs. McConway & T. Co., 6 Pa. Dist. R. 353.

In *Shirk vs. City of Lafayette* 52 Fed. Rep. 857, it was decided, the Revised Statutes Ind., 2988 which provides: "that it will be unlawful for any person, association or corporation to appoint a non-resident, a trustee in a deed, mortgage or other instrument in writing, except wills, for any purpose whatever" is in conflict with Constitution U. S., Art. 4, Sec. 2, which provides that citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.

In *Steed vs. Harvey* 54 P. 1011. It was held: that the Constitution of U. S. Amendment 14th, Sec. 1, declaring no State "shall deny to any person within its jurisdiction the equal protection of the laws" secures to every person within the jurisdiction of a State, though not a citizen or even a resident, the protection of its laws.

equally with its own citizens, and entitles him to the same remedies. See also Hammond Beef & Provision Co. vs. Best, 91 Me. 431.

In *Apex Transportation Co. vs. Garbade*, 54 P. 367, it was held: that the Constitution of the U. S., Amendment 14, Sec. 1, declaring that no State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of its laws, means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under the same circumstances. See Brannon, 14th Amendment, p. 315.

Acts done under the authority of a statute embrace all ordinances of municipal corporations as well as acts of State Legislation. Simonten on Federal Courts, p. 79; 2 Peters 463; 93 U. S. 120.

This City ordinance which provides, none but resident citizens of the City of New Orleans shall be employed as laborers, on the work, is prejudicial to the property owner for the charter of the City of New Orleans, Act 1882, page 25, section 21, provides: "All contracts for public works or for materials or supplies ordered by the Council, shall be offered by the comptroller at public auction and given *to the lowest bidder* who can furnish security satisfactory to the Council, or the same shall at the discretion of the Council, be advertised for proposals to be delivered to the comptroller in writing, sealed and to be opened by said comptroller in presence of the Finance Committee of said Council and given to the person making *the lowest proposal* therefor who can furnish security satisfactory to the Council."

It is prejudicial to the property owner, for as you restrict the number of workmen you increase the price of the work.

Second. The laws of the State of Louisiana and the ordinances off the City of New Orleans which condemn a property owner to pay for the paving of a street irrespective as to whether he is benefited or not by the paving and authorizes a personal judgment against him when he is not benefited, but damaged by the paving is violative of the Constitution of the United States, are the following:

Act No. 119 of 1882, of the General Assembly of La.,

No. 119. AN ACT.

To amend an act entitled "an act to incorporate the City of New Orleans, provide for the government and administration of the affairs thereof; and to repeal all acts inconsistent and in conflict with its provisions" approved June 23, 1882, and to provide for paving and banqueting streets in the City of New Orleans.

Public notice having been given, in accordance with the requirements of Article 48 of the Constitution.

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana.* That Section 37 of Act No. 29 approved June 23, 1882, entitled "an act to incorporate the City of New Orleans, provides for the government and administration of the affairs thereof, and to repeal all acts inconsistent, and in conflict with its provisions" be amended and re-enacted to read as follows:

"The Council may, in its discretion, provide for the paving or banqueting of any street or portion thereof at the expense of the whole city, and may thereupon force, impose and collect on *paving*, of the front proprietors of lots fronting on said streets, a special assessment, in proportion to frontage of three-quarters of the cost of said improvement, and such local assessment shall have a first privilege, superior to vendor's privilege and all other privileges and mortgages. The

other one-fourth in addition to intersections, to be paid by the city, *on banqueting the whole cost to be collected from front proprietor; provided that a two-thirds* vote of the members of council is secured for said banqueting or paving; and whenever council shall deem it necessary to take such action, notice of said intention shall be published in the official journal, once a week for four weeeks, and such improvements shall be subject to the conditions already prescribed for improvement or repairs to be made, on compliance with the petition of property-holders and payment thereof, shall be assumed and collected in like manner."

These statutes of the State provide for the paving of a street at the expense of the property owner, irrespective of benefit or value of the property—rest on a basis that exclude any consideration of benefit or value—impose a personal liability on the owner in excess of the value of the property with lien and privilege on the property, and provide for no means of defense except such as may be urged before the court when the claim is made.

That the statutes of Louisiana, and the ordinances of the City of New Orleans, that provide that the Council may in its discretion provide for the paving of a street at the cost of the front proprietors, without taking special benefits into account and whether it was benefited or not is violative of the Constitution of the United States, that the statute on its face is unconstitutional because it rests upon a basis that excluded any consideration of benefits, was decided in favor of plaintiff in error in the case of Norwood vs. Baker, 172 U. S. R., p. 269, and if that decision had not been disturbed in French vs. Barber Asphalt Company decided April 29, 1901, we would be certain of what will be the decision in this case. We can add nothing to the dissenting opinion of three of the judges of the court.

But the facts in the French case are not exactly the facts in this case. The court after reciting the manner of proceeding to make the improvement says: "In this instance neither such a remonstrance nor petition was filed and the Common Council upon the recommendation of the Board of Public Works enacted an ordinance requiring the construction of the pavement." In this case, Chadwick objected, remonstrated, sent two or three petitions against the pavement to the board. R., p. 16.

The Court in its statement says: "Such lien can be enforced only by suit in a court of competent jurisdiction, against the owners of the land charged. No personal judgment was authorized to be rendered against the owner of the land. The right was expressly conferred on the owner of reducing the amount of the recovery by pleading and proving any mistake or error in the amount of the bill, or that the work was not done in a good and workmanlike manner."

By the law of Louisiana, and at issue in that case a personal judgment was rendered against Chadwick. A personal liability is alleged in the petition and a personal judgment prayed for. The judgment is: "It is ordered, adjudged and decreed, that there be judgment in favor of the plaintiff John Kelley and against the defendant Edmund H. Chadwick, for the sum of Six Hundred and Thirty-eight 80-100 dollars with six per cent. interest thereon from September 24th, 1896, until paid, and all costs of suit. The whole with recognition of plaintiff's lien and privilege for the payment thereof on the following described property: Five certain lots, etc., and on the proceeds thereof, the said property to be sold and the proceeds applied to the payment of the plaintiff's claim as herein adjudged." R., pp. 49, 50.

Act No. 73 of 1876, p. 116, Section 1, provides: "The

whole cost of said improvement, paving, etc., in front of the property fronting on said street or streets or portion thereof, shall be borne by the owner or owners of said property in equal proportions, according to the running foot on each side of the street or streets or portion thereof. The cost of paving or repairing, grading or regrading of intersections of streets shall be paid by the city."

This section was amended by Section 32 of Act No. 20 of 1882, but the personal liability of the owner of the property was preserved.

Act 20 of 1882, p. 30, Section 37 provides: "The Council may in its discretion provide for the paving or banqueting of any street or portion thereof at the expense of the whole city and may *thereupon force, impose, and collect of the front proprietor* of lots fronting on such streets, a specific local assessment in proportion to the frontage and not exceeding the increase in the value of the property, occasioned by the local improvement, and such local assessment shall have a first privilege superior to vendor's privilege and all other privileges and mortgages."

This section of the law of 1882 is constitutional, for the assessment must not exceed the increase of the value of the property, occasioned by the local improvement.

But this valid assessment is changed by the next law, Act 119 of 1886, Section 1. We have quoted the section to show that the law imposes a personal liability on the owner to the extent of the increased value of the property.

The next law, Act No. 119 of 1886, p. 119, imposes the assessment irrespective of the question of benefit and imposes on the owner a personal liability for the assessment irrespective of benefit, and provides the whole cost shall be borne by the property owner.

The Section reads: It amends Section 37 of Act No.

20 approved June 23, 1882, and re-enacts it so as to read as follows. Be it enacted, etc.: "That Section 57 of Act No. 20, approved June 23, 1882, entitled an act to incorporate the city of New Orleans, provides for the government and administration of the affairs thereof, and to repeal all acts inconsistent and in conflict with its provisions," be amended and re-enacted so as to read as follows: "The Council may in its discretion, provide for the paving or banqueting of any street, or portion thereof at the expense of the whole city, and may thereupon force, impose and collect, on paving of the front proprietors of lots fronting on said streets a special assesment, in proportion to frontage of three-quarters of the cost of said improvement, and such local assessment shall have a first privilege, superior to vendor's privilege and all other privileges and mortgages. The other one-fourth, in addition to intersections, to be paid by the city. In banqueting the whole cost to be collected from front proprietors; *provided* that a two-third vote of the members of Council is secured, for said banqueting or paving; and whenever Council shall deem it necessary to take such action, notice of said intention shall be published in the official journal, once a week for four weeks, and such improvements shall be subject to the conditions already prescribed for improvement or repairs to be made, on compliance with the petition of property-holders and payment thereof shall be assumed and collected in like manner."

The Act of 1894, No. 142, page 179, amended Act No. 119, approved July 8, 1886, the previous act, and Section 1 reads: "The City Council of New Orleans may in its discretion, provide for the paving of any street, or portion thereof, at the expense of the whole city, and may thereupon force, impose and collect of the front proprietors of lots fronting on said street or streets, a special assessment in proportion to frontage of three-

quarters of the cost of said improvement and such local assessment shall 'have a first privilege, superior to vendor's lien and privilege, and over all other privileges.' The other one-fourth in addition to intersections are to be paid for by the City."

Section 2 provides: "Be it further enacted by the General Assembly, that the Council may in its discretion, provide for the paving of any banquette or sidewalk, the whole cost of which, as well as the intersections to be paid for by the front proprietors in proportion to the frontage owned by such, upon completion of the paving."

So far we have shown that by the statutes of the State of Louisiana that the property owner is made to pay the cost of the improvement irrespective of the question of benefit, is made personally responsible for the cost of the improvement although it may largely exceed not only the benefit to his property, but the value thereof, and his property is made subject to a lien, privilege and mortgage to secure the payment.

Such statutes and the ordinances in furtherance of them are unconstitutional, violate Article XIV Amendments which provide "nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It was so decided in Norwood vs. Baker, 172 U. S., R., p. 270, and if that decision had not been disturbed, by the decision made in French vs. Barber Asphalt Company, decided April, 29, 1901, we might submit this case without further argument. The dissenting opinion in that case presents every argument that can be presented in support of this case.

There are differences, however, between the Norwood case and this case, which entitle us to relief.

In the French case the Court said "no remonstrance

was made by the property owner against the improvement." In this case the remonstrance was made. See evidence of Chadwick, R., p. 16.

In the French case the Court said: "It may be conceded that Courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or proerty, without due process of law. And such, in the opinion of a majority of the judges of this Court, was the nature and effect of the proceedings in the case of Norwood vs. Baker."

In Louisiana we have no separate law and equity practice—all defenses may be pleaded in an action. We submit that this case is one for the Court to afford a remedy. The lots in question were bought by the defendant Chadwick for $8.30 apiece, R., p. 14. They are two feet below the sea level, R., p. 14—the curbing of the street is 2 1-2 feet above the surface of the lots. It would cost $1615 to fill them to the city grade, pp. 14, 15, 20. The defendant has tried ineffectually to sell the whole square for $500, R., p. 14. It is not worth anything because it is always almost covered with water, R., p. 17. The cost of filling would be more than the value of the lots, R., p. 17. It would cost $4,500 to fill the whole square, $1615 to fill the 5 lots. The result is the plaintiff bought the 5 lots for $8.30 apiece, $41.50. After the paving he ineffectually tried to sell them for $20 a lot, p. 14. The suit against him for paving in front of these 5 lots is for $638.80, and judgment for that amount was rendered against him with lien and privilege on the lots. We submit that this is not only taking private property for public use without just compensation, but besides making a property owner after his property has been taken from him, pay much more than the value of his property. It is taking his other property to pay for the pretended im-

provement. Can a Legislature do this in the face of the Constitution of the United States which says "nor shall private property be taken for public use without just compensation?"

In the case of Town of Tonawanda vs. Patton, decided by this Court April 29, 1891, 181 U. S., the Court said: "The case of Norwood vs. Baker presented as the judge in the Court in the present case well said 'considerations of peculiar and extraordinary hardships' amounting in the opinion of a majority of the judges of this Court to actual confiscation of private property for public use and bringing the case fairly within the reach of the 14th Amendment."

The law then is, that when case of peculiar and extraordinary hardships is presented, amounting to actual confiscation, the principles established in the Norwood case will be enforced. The case now before the Court presents not only a case of hardship and confiscation, but the defendant is made personally responsible for much more than the value of his lots. He bought the 5 lots for $8.30 apiece, R., p. 14. They are 2 1-2 feet below sea level. It would require $1615, R., p. 15 to fill the five lots to city grade. He offered to sell not only the five lots, but the whole square for $500, R., p. 16. Now he is condemned to pay $638.80 for paving in front of five lots that cost $41.50. In Meyer vs. City of Covington, 45 S. W. 769 it was decided: a statute authorizing a personal judgment against the owner of abutting property for the amount assessed against his property for the costs of widening a street is unconstitutional.

We pray that the judgment of the Civil District Court for the parish, affirmed by the Supreme Court of the State of Louisiana be reversed, and that the case be remanded with directions to dismiss the suit.

Respectfully submitted,

GEO. L. BRIGHT,

Counsel for E. H. Chadwick, Plaintiff in Error.

Supreme Court of the United States.

No. 63.—October Term, 1902.

Edmund H. Chadwick, Plaintiff in Error, vs. John M. Kelly. } In error to the Supreme Court of the State of Louisiana.

[January 5, 1903.]

In April, 1897, John M. Kelly filed his petition in the Civil District Court for the parish of Orleans against Edmund H. Chadwick, to enforce payment of a lien on a certain square of ground in the city of New Orleans, created and arising out of a contract between one A. J. Christopher and said city for paving Hagan avenue. The petition alleged due completion of the work, an assignment or transfer by Christopher, of all his rights and claims under the contract, to the petitioner, and a liability of Chadwick for the amount of $638.80, with interest thereon from September 24, 1896; and also alleged that for the payment of said sum he had by law a lien and pledge upon said property.

Chadwick answered this petition, wherein he pleaded the general issue and certain special pleas, in one of which he denied that his property was benefited by the paving, and alleged that, if it was so benefited, he could only be made to pay the amount of benefit to an increased value of property, and that no personal judgment should be rendered against him. He also filed, in September, 1899, a supplemental answer in which, among other things, he alleged that the ordinance under which the work was done required the contractor to employ only *bona fide* resident citizens of the city of New Orleans as laborers on the work, thus depriving the citizens of the State and of each and every State of the privileges and immunities of citizens in the several States, secured to them by the Constitution of the United States, which, by the second section of its fourth article, provides that the citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States; and he also alleged that the ordinance was likewise illegal and unconstitutional because it imposed a liability on the property owner, irrespective of the question whether or not his was benefited or damaged by the pavement; and he alleges that the paving of the street in front of his property had been of no benefit to it, and that the rendition of any judgment against him would be taking his private property for public purposes, contrary to the constitution of the State of Louisiana and to that of the United States.

Evidence was taken, and the cause was so proceeded in that on March 5, 1900, judgment was rendered against the defendant, Chadwick, in the

sum of $638.80, with interest from September 24, 1896, with costs of suit, with recognition of plaintiff's lien and privilege for the payment thereof on the said property, the same to be sold and the proceeds to be applied to the payment of plaintiff's claim.

A suspensive appeal was thereupon allowed to the Supreme Court of Louisiana, and that court, on February 4, 1901, affirmed the judgment of the trial court, and subsequently allowed a writ of error to bring the cause to this court.

Mr. Justice SHIRAS delivered the opinion of the Court.

In this record, Chadwick, the plaintiff in error, complains of the judgment of the Supreme Court of Louisiana in two particulars: First, in upholding as valid the statutes of Louisiana and the ordinances of the city of New Orleans, which provide and regulate the method for the paving of streets at the cost of the owners of abutting lots; and, second, in upholding as valid the ordinance of the council of the city of New Orleans, which provides that, in all the contracts let by the city for public works, of any kind and nature, the contractor shall not employ any other but *bona fide* resident citizens of the city as laborers on such public works.

Of course, this court is restricted to a consideration of these questions in their Federal aspect.

The brief of the counsel of the plaintiff in error contends that, by the statutes of the State of Louisiana, the property owner is made to pay the cost of the improvement irrespective of the question of benefit, is made personally responsible for the cost of the improvement, although it may largely exceed, not only the benefit to his property, but the value thereof, and his property is made subject to a lien to secure the payment.

So far as it is complained that by the statutes the property owner is made personally responsible for the cost of the improvement, we learn from the opinions of the Supreme Court in the present case and in the case of *Barber Asphalt Company* v. *Watt*, reported in 51 Annual, 1345, that "for the sum assessed against their property no personal ability attaches to the abutting owners beyond the value of the property affected, and that the proceeding is purely one *in rem*, acting on the property benefited and none other," and that "the property owner's proportion of the cost of paving a street should be determined by ascertaining the entire cost of the work assessable to the property fronting thereon, and apportioning the same to said property in proportion to foot frontage."

This construction of the State statutes by the Supreme Court of the State must, of course, in a case like the present, be accepted by us; and we have only to consider, in this branch of the case, whether the statutes of Louisiana, so construed, which provide and regulate a method of improving and paving streets in the city of New Orleans, and apportion-

ing the cost thereof by assessment upon the abutting property, are obnoxious, under the facts of the present case, to the provisions of the Fourteenth Amendment to the Constitution of the United States.

We do not feel constrained to enter at large upon a subject which has received such frequent and recent consideration by this court. It is, perhaps, sufficient to say that we do not perceive in the statutes of Louisiana, as construed and applied in this case by the Supreme Court of that State, any provisions which we must condemn as being in disregard of the constitutional rights of the plaintiff in error. In view of our decisions, we certainly cannot say that, as matter of law, a State statute which makes the cost of paving a street in a city assessable upon the abutting properties and a lien thereon, is unconstitutional. (*Willard* v. *Presbury*, 14 Wall. 676; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Spencer* v. *Merchant*, 125 U. S. 345; *Bauman* v. *Ross*, 167 U. S. 548; *Parsons* v. *District of Columbia*, 170 U. S. 45; *Wight* v. *Davidson*, 181 U. S. 371; *French* v. *Barber Asphalt Company*, 181 U. S. 324.)

In the opinion of the Supreme Court of Louisiana, which we find in this record, it is said:

"There can be no question, and in fact it is conceded, that by Act No. 119 of 1886, and by that act as amended by Act No. 142 of 1894, the council of the city of New Orleans was authorized, in its discretion, to provide for the paving or banquetting of any street, or portion thereof, at the expense of the whole city, and to thereupon force, impose and collect of the front proprietors of lots fronting on said streets a special assessment in proportion to frontage of three-quarters of the cost of said improvements," and that by said acts it was enacted that "such local assessment should have a first privilege, superior to vendor's privilege and all other privileges and mortgages.

"The constitutionality of those acts is not attacked directly, but the exercise by the city of authority, under the powers so granted, is questioned as being illegal and unconstitutional. . . . It is too late to question the right of the general assembly to establish particular districts for the attainment of special local public good, through works of a particular character, and to order itself, or to authorize some political body to order, special assessments to be made, within the district, for the purpose of meeting the cost and expenses of such works. (*George* v. *Sheriff*, 45 Annual, 1232.) . . . It is true that in some instances almost the whole benefit accrues to a few, but there can be no universal rule of justice, upon which such assessments can be made. An apportionment of the cost that would be just in one case would be oppressive in another. For this reason the power to determine when a special assessment shall be made, and on what basis it shall be apportioned, rests in the legislature or some political body to which it has delegated that authority. . . . The city has simply exercised its unquestionable right and power of paving an existing public street in the interest of the special local public benefit, and demanded of owners of property abutting and fronting on the street that they contribute to the cost of the improvement in a manner and form and to an extent fixed by the general assembly. The object of the paving

of the street was to benefit parties owning property upon it by the improvement of the access to their properties. It is not pretended that this particular purpose was not accomplished even as to appellant's property. It cannot be exacted for the purpose of sustaining the constitutionality of a statute or ordinance authorizing a work of local public improvement, at the cost of abutting owners, that it be shown there is benefit in every possible respect to the particular owners, nor that the benefit be direct and immediate. . . . The general assembly has, in Act No. 119 of 1886, conferred upon the common council the right and power, by a two-thirds vote, to constitute any particular street which it proposes to pave a special taxing district for the purpose of meeting the cost of such paving. It has exercised this right and power in the matter of the paving of Hagan avenue. Having done so, the legislature itself has designated how, in what proportion, and by what standard this cost is to be met. The council was not at liberty to depart from this apportionment. The judiciary is not to alter it and to substitute for a fixed legislative standard a fluctuating judicial standard based upon actual benefits received and measured by values or enhanced values to be established by evidence and proof."

We think these views are consonant with the great weight of authority, both State and Federal. As expressed by Cooley in his work on Taxation, page 429:

"The matter is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere. With the wisdom or unwisdom of special assessments when ordered in cases in which they are admissible, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion."

No such case is presented by the facts in the present case as would justify an intervention by the Federal courts with a system of special assessments prescribed by the legislature and approved by the courts of a State.

Because the ordinance and specifications, under which the paving in this case was done, require the contractor to employ only *bona fide* resident citizens of the city of New Orleans as laborers on the work, it is contended, on behalf of the plaintiff in error, that thereby citizens of the State of Louisiana, and of each and every State and the inhabitants thereof, are deprived of their privileges and immunities under article 4, sec. 2, and under the Fourteenth Amendment to the Constitution of the United States. It is said that such an ordinance deprives every person, not a *bona fide* resident of the city of New Orleans, of the right to labor on the contemplated improvements, and also is prejudicial to the property owners, because, by restricting the number of workmen, the price of the work is increased.

Such questions are of the gravest possible importance, and, if and when actually presented, would demand most careful consideration; but we are not now called upon to determine them.

In so far as the provisions of the city ordinance may be claimed to affect the rights and privileges of citizens of Louisiana and of the other States,

the plaintiff in error is in no position to raise the question. It is not alleged, nor does it appear, that he is one of the laborers excluded by the ordinance from employment, or that he occupies any representative relation to them. Apparently he is one of the preferred class of resident citizens of the city of New Orleans.

It is further argued that the ordinance is prejudicial to the property rights of the plaintiff in error, because by confining the right to labor on works of municipal improvement to resident citizens, the cost of such works might thus be increased.

But we think such a consequence is too far-fetched and uncertain on which to base judicial action. The plaintiff in error did not raise such a question in time to stay the work *in limine*. He awaited the completion of the work, and until his property had received the benefits, whatever they were, of the improvement. Nor did he, on the trial, adduce any evidence from which the court might have found that the actual cost in the present case was increased by the operation of the ordinance. Possibly the effect of the ordinance in preferring the labor of resident citizens might tend to increase the cost of the work, or it might have the opposite effect by inducing outside laborers to become resident citizens. But, as we have said, such conjectural results are too remote and uncertain to furnish materials for judicial determination. The serious duty of condemning State legislation as unconstitutional and void cannot be thrown upon this court, except at the suit of parties directly and certainly affected thereby.

The judgment of the Supreme Court of Louisiana is

Affirmed.

Mr. Justice HARLAN and Mr. Justice WHITE dissent.

True copy.

Test:

Clerk Supreme Court, U. S.